No. __-_____ Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1995

MICHAEL LEBRON,

Petitioner,

—v.—

NATIONAL RAILROAD PASSENGER CORPORATION (AMTRAK),

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

R. BRUCE RICH
BERNADETTE M. MCCANN EZRING
JONATHAN BLOOM
MARC BROTMAN
WEIL, GOTSHAL & MANGES LLP
767 Fifth Avenue
New York, New York 10153
(212) 310-8000

GLORIA C. PHARES
PAUL, HASTINGS, JANOFSKY & WALKER
399 Park Avenue
New York, New York 10022
(212) 318-6016

DAVID D. COLE
Counsel of Record
CENTER FOR CONSTITUTIONAL RIGHTS
Georgetown University Law Center
600 New Jersey Avenue, N.W.
Washington, D.C. 20001
(202) 662-9078

Attorneys for Petitioner

QUESTIONS PRESENTED

I. Whether Amtrak's refusal to display petitioner's advertisement based on an unwritten policy against "political" advertising constituted viewpoint discrimination under *Rosenberger v. Rector of the University of Virginia*, 115 S. Ct. 2510 (1995), where

A. Amtrak previously had permitted the display of conservative political advertising; and

B. Amtrak would have permitted petitioner's ad had he addressed the same subject matter—whether to buy Coors beer—from a commercial rather than a political viewpoint.

II. Whether, in its public forum analysis, the court of appeals erred by focusing narrowly on only a single Penn Station billboard, where Amtrak's implementation of its stationwide advertising policy showed that it had created a designated public forum for political and commercial advertising on all billboards.

III. Whether Amtrak's unwritten and undefined policy against "political" advertising was unconstitutionally vague under this Court's decision in *Hynes v. Mayor of Oradell*, 425 U.S. 610 (1976), which held impermissibly vague the term "political . . . cause."

IV. Whether the court of appeals erred in creating a standing doctrine that makes it more difficult to bring First Amendment claims than other legal claims and bars petitioner from challenging the very policy that was applied to him.

PARTIES TO THE PROCEEDINGS

Petitioner Michael A. Lebron was plaintiff-counter-defendant-appellee below. Respondent the National Railroad Passenger Corporation (Amtrak) was defendant-appellant below. Transportation Displays Incorporated, a defendant in the proceedings before the district court, appears on the caption of the proceedings below as defendant-counter-claimant but did not participate in the proceedings before the court of appeals.

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PETITION FOR A WRIT OF CERTIORARI

Michael A. Lebron respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Second Circuit.

OPINIONS BELOW

The opinion of the court of appeals (App., *infra*, 1a-24a) is reported at 69 F.3d 650; its revised opinion on rehearing (*id.* at 1b-6b) is not yet reported.[1] The opinion of the district court (*id.* at 1c-22c) is reported at 811 F. Supp. 993.

[1] "App." refers to the appendix to this petition. "CA App.," "E," and "SE" refer respectively to the following documents in the court of appeals: the appendix, the exhibit volumes, and the supplemental exhibit volume.

JURISDICTION

The judgment of the court of appeals was entered on December 29, 1995 (App., *infra*, 1d-2d). The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISION INVOLVED

The First Amendment states in pertinent part that:

> Congress shall make no law . . . abridging the freedom of speech. . . .

STATEMENT

I. Introduction

This case arises out of a decision by the National Railroad Passenger Corporation ("Amtrak") not to display petitioner Michael A. Lebron's advertisement on a billboard in New York's Pennsylvania Station ("Penn Station"). Lebron's advertisement urges viewers not to buy Coors beer because the Coors Brewing Company supports various conservative causes. In rejecting the ad, Amtrak invoked an unwritten and undisseminated policy against "political" advertising. Amtrak had never before rejected an ad for display anywhere in Penn Station on the ground that it was political.

The district court, per then-District Judge Pierre N. Leval, found that: (1) Amtrak had in fact displayed numerous political ads in Penn Station in the past; (2) Amtrak's written standards permitted noncommercial public service advertising; (3) many of the people responsible for Amtrak advertising had never even heard of the asserted unwritten policy; and (4) those who had heard of the policy could not coherently define it. The court therefore held that Amtrak's policy against political advertising violated the Constitution because it was unwritten, vague, inconsistently applied, and poten-

tially viewpoint-based (depending on which of the many different definitions of the policy applied).

The court of appeals reversed, with Chief Judge Jon O. Newman dissenting.[2] App., *infra*, 1a, 18a. The court rested its decision on what it characterized as its "finding" that Amtrak had two policies—one limited to the Spectacular, the particular billboard to which Lebron sought access, and another governing advertising in the rest of Penn Station. *Id.* at 15a, 16a. As a result, the panel deemed irrelevant Amtrak's past advertising practices on other billboards in Penn Station, and held that Lebron lacked standing to challenge Amtrak's general Penn Station advertising policy because it had not been applied to him. *Id.* at 16a-18a.

Lebron sought rehearing on the ground that the linchpin of the panel's decision—its "finding" that there was a unique policy applying only to the Spectacular—was contrary to both the district court's finding *and* Amtrak's admission that one set of advertising standards governed all of Penn Station. The panel then issued an amended opinion, jettisoning its erroneous "finding," but failing to change its legal analysis. App., *infra*, 1b-4b. Judge Newman dissented again, maintaining that once the panel acknowledged that there was only one policy, its legal analysis had no foundation. *Id.* at 4b-6b.

Thus, the holding that petitioner challenges here is that a government entity that has consistently displayed political ads in a major public thoroughfare may exclude a particular political ad by asserting an unwritten, undisseminated, undefined, and never-before-invoked policy against "political" adver-

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[2] By the same divided vote, the panel had initially reversed on state action grounds, holding that Amtrak was a private entity not subject to constitutional constraints. 12 F.3d 388 (2d Cir. 1993). Last year, this Court reversed that decision, holding that Amtrak is a governmental actor for constitutional purposes, and remanded to the court of appeals to permit it to address Lebron's First Amendment claims. *Lebron v. National R.R. Passenger Corp.*, 115 S. Ct. 961 (1995).

tising. The panel's analysis leaves the public forum doctrine an empty shell, treats as viewpoint-neutral conduct that this Court and several other circuits have characterized as viewpoint-based, and conflicts with this Court's vagueness and standing decisions.

II. Statement Of Facts

The facts, as found by the district court and stipulated by Amtrak (SE2365-68, SE2381-84), are as follows:

Penn Station and the Spectacular. Penn Station, owned by Amtrak, is one of the busiest public crossroads of pedestrian traffic in New York City. Approximately 200,000 people pass through the station every day going to and from the Amtrak, New Jersey Transit, and Long Island Railroad trains that use the station, and the New York subway that abuts it. SE2365; A338-39, A341; *Streetwatch v. National R.R. Passenger Corp.*, 875 F. Supp. 1055, 1057 (S.D.N.Y. 1995).

Penn Station is a large, multi-purpose facility. Its upper level, where the Spectacular billboard at issue here is located, combines the railroad station with numerous restaurants and shops, providing an underground "Main Street" for the traveling public. The station includes a bookstore, several newsstands, a jewelry store, bakeries, novelty and souvenir shops, drugstores, several restaurants and fast food shops, a bank, clothing stores, a cutlery shop, bars, flower stalls, and an electronics store. A517; E1297-1303.

Amtrak leases space to advertisers throughout Penn Station, on numerous billboards, dioramas, and kiosks. The Spectacular billboard is a large, curved, back-lit display space approximately 103 feet long by 10 feet high, located on the east-facing wall of the station's rotunda. App., *infra*, 2c. Immediately in front of the Spectacular in the rotunda is a four-sided advertising kiosk.

Lebron-Amtrak Contract. Lebron first contacted Transportation Displays Incorporated ("TDI"), Amtrak's adver-

tising agent, about leasing billboard space in Penn Station in August 1991. App., *infra*, 2c. Lebron told TDI that his work was "political," and showed TDI's representative examples of his prior political work.[3] TDI never suggested that the political nature of the work would be a problem, and assured Lebron that while obscene or violent displays would not be accepted, there were no other policy restrictions on advertising. *Id.* at 3c.

Lebron and TDI signed a contract on November 30, 1992, leasing the Spectacular to Lebron for January and February 1993. App., *infra*, 3c. On December 2, 1992, Lebron provided TDI with a copy of his work pursuant to the contract provision that "[a]ll advertising copy is subject to approval of TDI and the Transportation Facility concerned as to character, text, illustration, design and operation." *Id.*

The work is a photomontage with text, in the style of a beer advertisement, which urges would-be purchasers not to buy Coors beer because the owners of the Coors Brewing Company support various conservative causes. *See* E2211. It states clearly that Lebron paid for the work, and explicitly disclaims any association with the work by "TDI, Amtrak, or The Port Authority of New York & New Jersey." SE2370; A230, A252; E2213.

TDI sent Lebron's work to Amtrak. App., *infra*, 4c. Anthony DeAngelo, the Amtrak Vice President for Real Estate and Operations Development responsible for advertising on Amtrak property, rejected Lebron's work, claiming that Amtrak had a "policy" against "political" advertisements. *Id.*[4]

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[3] SE2375-76; A160-65, A167-68, A170-71, A174-75, A212-13; A586-88; E2137-41.

[4] When Amtrak rejected Lebron's ad, TDI offered to rent Lebron space on other billboards in New York, but did not offer any billboard space in Penn Station, in light of Amtrak's asserted policy.

Amtrak's Advertising Policy. The policy that Amtrak asserted, *ex post*, to reject Lebron's ad was unwritten, undisseminated, and undefined.[5] Amtrak's executives "were themselves at odds over the meaning of Amtrak's policy." App., *infra*, 17c.

DeAngelo testified that Amtrak's "policy" prohibits advertisements that are "objectionable to our riding public and others associated with us including political and other types of potentially controversial matters." A349. He defined "objectionable to the riding public" as:

> Issues that would cause our passengers to be concerned and upset to write letters to us, to talk about it amongst themselves and things which they would find inappropriate for Amtrak to be a part of.

A378. DeAngelo initially defined "political" as "mostly noncommercial," A352, but stated that advertisements that do not sell products are only "potentially" political. A354.

Others had different understandings. Bruce Bourque, who conducts the initial reviews of advertising for the Spectacular (and also reviewed Lebron's work), admitted that he "could not really say what [a policy barring 'political' advertising] meant." App., *infra*, 17c. Bourque identified many commercial advertisements as "political." A835-36, A843; E306. William Delaney, who also reviews advertising content for Amtrak, had never even *heard* of a policy against political or any other advertising (other than a prohibition on advertising by Amtrak's competitors). App., *infra*, 16c. No one at TDI, Amtrak's agent for all Penn Station advertising,

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[5] Amtrak's policy against political advertising was reflected in writing in several superseded contracts governing Penn Station advertising, App., *infra*, 15c, but, as the district court noted, the TDI-Amtrak contract in force when this dispute arose contained no such language. *Id.* at 16c. In fact, that contract expressly *permitted* the display of public service and nonprofit advertising in Penn Station. *Id.* at 19c.

was aware that Amtrak had a policy against political advertising.[6] *Id.*

DeAngelo has never informed members of his staff responsible for inspecting advertising in Amtrak stations of any policy against political advertising. The staff is simply expected to use its "common sense" in evaluating whether advertisements are "contributing to the overall effectiveness" of the station. A359-60, A362-65, A386-88.

Amtrak's Advertising Practices at Penn Station. Amtrak maintained both in the district court and on appeal that its unwritten policy against political advertising applied to all advertising in Penn Station. SE2384; Resp. CA Br. at 7. Yet until this case, Amtrak had never disapproved a single ad as "political" or "objectionable." A371-72, A384-85; A755-57, A770-71; A823. In fact, Amtrak consistently had displayed political advertising at Penn Station, without a single objection from the riding public. A392-93; A617. For example, since at least 1988, the Worldwide Church of God had leased a four-sided, seven-foot high kiosk immediately in front of the Spectacular to advertise and distribute *The Plain Truth*, a free noncommercial magazine that contains articles on social and political issues such as homosexuality, gambling, the Arab-Israeli conflict, and religious information about the Worldwide Church of God. App., *infra*, 7a, 20c. *The Plain Truth* ad displayed when this suit commenced urged viewers to "Say No To Adultery." E202-03.[7] Amtrak has also leased space in Penn Station to other noncommercial and/or politi-

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[6] TDI's own advertising guidelines, upon which its agents rely, expressly permit political and other ideological advertising. A628, E176. They also permit public service advertising, defined as "non-commercial, non-partisan" advertisements not designed to influence elections or legislation. E178. TDI's public service advertising has included subjects such as homelessness, the environment, drunk driving, AIDS awareness, health issues, and race relations. A622, A626.

[7] The kiosk featured bins containing copies of the magazine for free distribution to the public. E202-03.

cal advertisers, including the New York Department of the Environment, the New York Department of Commerce, and a muscular dystrophy foundation. E261, E268, E277, E283; E345; A988-90.

Amtrak's Related Free Speech Activities. Amtrak's "Regulations For Exercise Of Certain Free Speech Rights In Pennsylvania Station, NYC," permit distribution of literature, display of placards and engagement of passersby in conversation about "religious, political or other views to the extent protected by the First Amendment . . . of the Constitution." SE2396; E114-120. Pursuant to these guidelines, Amtrak has permitted a variety of individuals and organizations to distribute political literature, engage in political discussions, and solicit funds for political causes within Penn Station, all without any adverse consequences to the "riding public." SE2396-97; E117; E287-88, E290, E292-93.[8]

III. Prior Proceedings

A. The district court concluded that Amtrak's policy was unconstitutional because it was unwritten, vague, had been applied in a discriminatory fashion, and might constitute viewpoint discrimination, depending on which of the many definitions Amtrak had offered was in fact applicable. App., *infra*, 15c-22c. In reaching this result, the court found (and Amtrak stipulated) that the policy invoked against Lebron was not specific to the Spectacular, but applied throughout Penn Station. *Id.* at 20c n.12; SE2384.[9] Because one policy gov-

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[8] Amtrak also leases space to numerous book stores and newsstands in Penn Station, which sell books and magazines on political issues. E1297-1303. Amtrak does not prevent these proprietors from selling or advertising literature with political messages. A518. And no one has ever complained about the political content of books or magazines sold by Penn Station retailers. A519.

[9] According to Amtrak, the *only* difference between the Spectacular and the other advertising space in Penn Station is procedural: with other advertising spaces, Amtrak applies its policy against "political" advertising after advertisements are displayed, whereas with the Spec-

erned all of Amtrak's Penn Station advertising, the district court examined how the policy had been implemented throughout the station to determine its scope and application. App., *infra*, 19c-20c.

B. The court of appeals reversed in a divided opinion. The panel majority based its reversal on its "finding" that there were two separate policies, one limited to the Spectacular, and another for the rest of Penn Station advertising. App., *infra*, 15a, 16a. In light of this finding, it concluded that Amtrak's Spectacular policy had been consistently applied because no political ads previously had been displayed on the Spectacular itself.[10] Because it found that a different policy applied to the rest of Penn Station, the panel deemed irrelevant the fact that Amtrak had displayed political ads elsewhere in the station, including the long-running ad for *The Plain Truth* immediately in front of the Spectacular. *Id.* at 15a, 16a.

The panel's presumption that the policy at issue was limited to the Spectacular was central to each of its legal conclusions. First, because no political ads had been displayed on the Spectacular itself, the Court concluded that "the Spectacular is not a public forum; most likely, it is a nonpublic forum, or perhaps it is a limited public forum opened for purely commercial speech." App., *infra*, 11a. Second, by ignoring Amtrak's display of numerous political ads elsewhere in Penn Station, the panel was able to uphold the policy as "reasonable . . . to avoid the criticism and the embarrassments of allowing any display seeming to favor any political view." *Id.* at 13a, 14a.

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tacular, it applies that policy before the advertisement is displayed. The substantive content of the policy, however, is the same. SE2390; A359-60; A374-75, A383-84; A607-08.

[10] There had been only six previous advertisers on the Spectacular, which tended to be leased out for long-term contacts. None of these prior advertisers had sought to display a political ad. Resp. CA Br. at 7 n.5.

Third, the panel concluded that Amtrak's policy was not viewpoint-based because Amtrak had never permitted political advertising on the Spectacular, and that Amtrak's consistent practice vis-à-vis the Spectacular demonstrated that the policy was not unconstitutionally vague. App., *infra*, 14a-15a, 15a-16a.

Finally, the court of appeals concluded that "[b]ecause we have found that Amtrak's policy against political advertisements was limited in scope to the Spectacular," Lebron could not challenge Amtrak's advertising policy as applied in other parts of Penn Station because that policy was "not at issue" in this case. App., *infra*, 16a.

Chief Judge Newman dissented. App., *infra*, 18a. First, he took issue with the court of appeals' narrow focus on the Spectacular as the forum. He maintained that under the panel's approach, Amtrak could deny use of the Spectacular for Republican Party advertising even if it had permitted the Democratic Party to advertise on one of the dioramas flanking the Spectacular. *Id.* at 20a-21a. In Judge Newman's view, "the relevant forum must be at least the advertising space in Penn Station, the means of communication to which petitioner sought access." *Id.* at 21a. Once the forum is properly defined, Judge Newman maintained, "Amtrak's violation of the First Amendment is evident, because it has leased advertising space on a kiosk in the rotunda for *The Plain Truth*, a magazine the Court acknowledges is devoted to 'political and social issues.' " *Id.*

Judge Newman also criticized the majority's conclusion that Amtrak's policy was not vague simply because it had not previously permitted any political ads on the Spectacular. "[W]here a policy is unwritten, unclear, and undisseminated, the fact that it has not yet been used discriminatorily does not save it from invalidation." App., *infra*, 21a. "The vice of conferring discretion on government officials to determine which messages may be conveyed is not avoided by their past pat-

tern of not making a discriminatory decision. The vice inheres in the opportunity for discrimination . . . ." *Id.* at 22a-23a.[11]

C. Petitioner sought rehearing, pointing out that the so-called "finding" on which every one of the panel's legal conclusions was grounded conflicted with the district court's finding (and Amtrak's stipulation) that Amtrak's advertising policy applied to all advertising in Penn Station and not just to the Spectacular. In response, the panel majority denied rehearing and issued an amended opinion in which it simply deleted the sentences that had expressly referred to its "finding" of a Spectacular-specific policy. App., *infra*, 3b. It made no substantive change in its legal analysis or conclusion.

Dissenting from the denial of rehearing, Judge Newman noted that the deletions from the court of appeals' decision "leave the Court's legal analysis . . . even more vulnerable than I thought it was in my original opinion." App., *infra*, 5b. Judge Newman observed that none of the legal conclusions in the court's revised opinion had a factual foundation. *Id.* at 5b-6b. Moreover, he maintained, "no matter what the scope of the forum, a governmental entity violates the First Amendment when it bars display of political messages pursuant to a 'policy' that has been found by a fact-finder, with abundant evidentiary support, to be vague, unwritten, undisseminated, unclear to those who administer it, and inconsistently applied." *Id.* at 6b.

REASONS FOR GRANTING THE WRIT

Before Michael Lebron came along, Amtrak had regularly permitted the display of political advertising in Penn Station,

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[11] While he found it unnecessary to reach the question given the policy's other constitutional infirmities, Judge Newman also observed that Amtrak's policy may constitute viewpoint discrimination, because it allows ads promoting the sale of beer for commercial reasons, but bars an ad opposing the purchase of the same product for political reasons. App., *infra*, 23a-24a.

and had never rejected any ad for its political content. Yet the panel majority in this case held that Amtrak could refuse to display Lebron's advertisement by asserting a policy against "political" advertising that was unwritten, undisseminated, undefined, and never before invoked. There are four reasons to grant a writ of certiorari.

First, the panel concluded that Amtrak had not engaged in viewpoint discrimination, despite the fact that it had long permitted the display of conservative political ads while rejecting petitioner's liberal message, and despite the fact that Amtrak's policy permitted the display of commercial viewpoints on the same subject matter addressed by Lebron's noncommercial ad. This analysis conflicts with two decisions of this Court holding that bans on "religious" speech constitute viewpoint discrimination where nonreligious speech on the same subject matter is permitted,[12] and with decisions of the First and Seventh Circuits applying that principle to transportation authorities' refusals to display political ads.[13] In fact, the Seventh Circuit invalidated a policy against "political" advertising virtually identical to that which the Second Circuit upheld.[14]

Second, the panel's crabbed version of public forum doctrine conflicts with decisions of this Court and several federal courts of appeal. Several members of this Court have stressed the dangerous circularity of accepting a governmental assertion that a forum is closed to a particular type of speech without carefully examining the property's past uses and physical

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[12] *Rosenberger v. Rector of the Univ. of Virginia*, 115 S. Ct. 2510 (1995); *Lamb's Chapel v. Center Moriches Union Free Sch. Dist.*, 113 S. Ct. 2141 (1993).

[13] *Air Line Pilots Ass'n v. Department of Aviation*, 45 F.3d 1144, 1159 (7th Cir. 1995); *AIDS Action Comm. v. Massachusetts Bay Transp. Auth.*, 42 F.3d 1, 11 (1st Cir. 1994).

[14] *Air Line Pilots Ass'n*, 45 F.3d at 1159.

characteristics,[15] yet that is precisely what the panel did here. When one looks at Amtrak's practice rather than its words, it is clear that Amtrak created a designated public forum for political ads by accepting them in the past under the same policy, and then impermissibly discriminated against Lebron. This case presents the opportunity to provide much needed guidance in a notoriously confused area of First Amendment doctrine.

Third, the panel's holding that Amtrak's policy against "political" advertising was not vague conflicts directly with this Court's decision in *Hynes v. Mayor of Oràdell*, 425 U.S. 610 (1976). *Hynes* declared a policy restricting solicitation for "political" causes to be impermissibly vague because "political" was undefined, yet the Second Circuit upheld Amtrak's use of the same undefined term.

Fourth, the panel's conclusion that petitioner lacked standing to challenge Amtrak's policy against political advertising as it had been applied throughout the rest of Penn Station conflicts with the core of this Court's standing doctrine, which always has permitted plaintiffs to challenge the constitutionality of policies applied to them. Through its revision of standing doctrine, the Second Circuit has made standing *more* difficult in First Amendment cases than in other cases, in the face of this Court's decisions stating precisely the opposite.

In rejecting Lebron's challenge, the panel relied principally on *Lehman v. City of Shaker Heights*, 418 U.S. 298 (1974), a plurality decision which upheld, on "captive audience" grounds, a policy against partisan political advertising on the interiors of municipal buses. In fact, the Second Circuit radically expanded *Lehman*. *Lehman*'s policy had not been

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[15] *United States v. Kokinda*, 497 U.S. 720, 737-38 (1990) (Kennedy, J., concurring); *id.* at 740 (Brennan, Marshall, Stevens, Blackmun, JJ., dissenting); *International Soc'y for Krishna Consciousness, Inc. v. Lee*, 505 U.S. 672, 695 (1992) (Kennedy, Blackmun, Stevens, Souter, JJ., concurring in the judgment).

applied selectively and discriminatorily; Amtrak's has been. *Lehman* addressed neither vagueness nor viewpoint-based challenges, yet the panel relied on *Lehman* to reach results on those issues directly contrary to subsequent Supreme Court decisions. Moreover, this case does not involve a captive audience, the decisive factor in the *Lehman* holding.

The panel's analysis, if left unreviewed, would mark the death knell of public forum doctrine, and would render meaningless the First Amendment prohibitions on vague and viewpoint-based laws. If government may selectively assert an unwritten, unenforced, and open-ended policy to justify exclusion from a forum that has previously permitted similar speakers, these doctrines will cease to have any speech-protective function.

I. Amtrak's Policy Against Political Advertising Is Viewpoint-Based According To Decisions Of This Court And Other Circuits

Amtrak's rejection of Lebron's ad was viewpoint-based in two respects, both of which create inter-circuit conflicts. First, Amtrak had previously accepted other political ads under the same policy, most notably an ad for *The Plain Truth*, a noncommercial magazine addressing social and political issues from a conservative fundamentalist perspective. To accept the *Plain Truth* ads while simultaneously rejecting Lebron's liberal ad is a classic instance of viewpoint discrimination.

The panel's decision to the contrary cannot be squared with *AIDS Action Committee v. Massachusetts Bay Transportation Authority*, 42 F.3d 1, 11 (1st Cir. 1994). In that case, the First Circuit held that the MBTA's refusal to display AIDS ads based on a policy against sexually explicit advertising was viewpoint discriminatory where the MBTA previously had displayed a sexually explicit ad for the movie *Fatal Instinct*. By contrast, the panel here treated as viewpoint-neutral Amtrak's rejection of Lebron's ad as "political," even though

Amtrak had for five years displayed political ads for *The Plain Truth* immediately in front of the Spectacular.

Second, even putting aside Amtrak's prior display of political ads, its policy is viewpoint-based under recent decisions of this Court and the Seventh Circuit. In *Air Line Pilots Ass'n v. Department of Aviation*, 45 F.3d 1144, 1159 (7th Cir. 1995), the Seventh Circuit held that a virtually identical policy against "political" advertising in O'Hare Airport would constitute viewpoint discrimination if "the proposed [advertisement] dealt with a subject that was 'otherwise permissible' in a given forum." There is no dispute that the subject matter of Lebron's ad—whether to buy Coors beer—was otherwise permissible. Coors could have displayed an ad urging people to buy its beer, and Anheuser-Busch could have displayed an ad urging people to forgo Coors beer for Budweiser. Amtrak's sole objection to Lebron's ad was that he urged viewers not to buy Coors beer for political reasons.

In its analysis of the O'Hare policy, the Seventh Circuit correctly followed *Lamb's Chapel v. Center Moriches Union Free School District*, 113 S. Ct. 2141 (1993), which held that a policy barring all "religious" speech was impermissibly viewpoint-based. This Court reaffirmed that analysis in *Rosenberger v. Rector of the University of Virginia*, 115 S. Ct. 2510 (1995), which invalidated as viewpoint-based a university policy banning the support of "religious" speech where the university supported nonreligious speech addressing the same subject matter. In *Rosenberger*, the Court expressly rejected the "assertion that no viewpoint discrimination occurs because the Guidelines discriminate against an entire class of viewpoints," reasoning that "[i]t is as objectionable to exclude both a theistic and an atheistic perspective on the debate as it is to exclude one, the other, or yet another political, economic, or social viewpoint." *Id.* at 2518. If excluding all "religious" views on an otherwise includible subject is viewpoint discrimination, so is Amtrak's exclusion

of "political" views on the includible subject of whether to buy a product.

The panel declined to follow *Lamb's Chapel* and *Rosenberger*, and instead purported to follow *Lehman v. City of Shaker Heights*, 418 U.S. 298. App., *infra*, 15a-16a and n. 4. In *Lehman*, a plurality upheld a policy against partisan political advertising on the interiors of municipal buses. But *Lehman* did not address whether the policy it upheld was viewpoint-based in the sense that this Court used that concept twenty years later in *Lamb's Chapel* and *Rosenberger*.[16] The panel's reliance on *Lehman* to find Amtrak's policy viewpoint-neutral conflicts sharply with *Lamb's Chapel* and *Rosenberger*.

The Seventh Circuit, relying on *Lamb's Chapel*, treated O'Hare's policy against political advertising as viewpoint-based. The Second Circuit, following *Lehman*, held that Amtrak's virtually identical policy was viewpoint-neutral. The Court should grant certiorari to resolve the confusion created by *Lehman*, *Lamb's Chapel*, and *Rosenberger*.

II. The Court Of Appeals' Conclusion That Amtrak's Past Display Of Political Advertising Did Not Create A Designated Public Forum Conflicts With Decisions Of Several Other Circuits

The panel's decision illustrates the necessity for clarification of fundamental issues in public forum doctrine: namely, how to define the geographic scope of a forum, and what evidence to consider in determining the nature of a forum (public, designated, or nonpublic). By arbitrarily confining its analysis to one particular billboard, accepting Amtrak's *post hoc* assertions over contrary evidence of Amtrak's prior administration of its policy, and ignoring the physical char-

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[16] As detailed below, the policy upheld in *Lehman* was significantly different from Amtrak's. *See infra* Section III.

acteristics of Penn Station, the panel rendered public forum doctrine meaningless.

The facts as found by the district court are not disputed: Amtrak repeatedly had displayed noncommercial, political advertisements in Penn Station, including the five-year ad for *The Plain Truth*. By Amtrak's own account, one substantive policy governed all advertising in Penn Station, including the Spectacular.[17] Through its practice of permitting political ads under this policy, therefore, Amtrak created a designated public forum for political ads and discriminated when it refused to display Lebron's ad. Yet the panel majority ignored this evidence and held that the Spectacular was a nonpublic forum, or at most a designated forum only for commercial ads. App., *infra*, 11a.

The panel's decision to limit its analysis to one billboard rather than to consider all Penn Station advertising conflicts with the decisions of the Seventh and Tenth Circuits. The union that challenged the policy against political advertising in *Air Line Pilots Ass'n* sought to display its anti-United Airlines ad only in O'Hare Airport's Concourse B (United's concourse). Yet the Seventh Circuit did not limit its inquiry to the specific billboard to which the union sought access, or even to Concourse B, but instead held that the relevant forum was all concourse advertising at the airport. *Air Line Pilots Ass'n*, 45 F.3d at 1151-52. Similarly, the Tenth Circuit recently held that where a Republican club sought to display a sign at a Christmas event in a public park, the relevant forum for First

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[17] Thus, this case does not present the question of whether a government entity may constitutionally adopt two different speech access policies for different parts of a particular public property. Nor does it involve the question of whether and under what circumstances a government entity may change its speech access policy. Amtrak does not claim that it applied different content standards to the Spectacular, nor that it decided to adopt a new policy when Lebron came along. Rather, its claim is that it has always had one set of advertising standards that applies throughout Penn Station.

Amendment analysis was not the Christmas event itself, but the public park. *Eagon v. City of Elk City*, 72 F.3d 1480, 1485 (10th Cir. 1996). *See also* App., *infra*, 20a.[18]

The panel's elevation of Amtrak's *post hoc* policy assertion over contrary prior practice also conflicts with decisions of this Court and several circuits which have insisted on the importance of objective evidence of practice over assertions of policy. In *Grace Bible Fellowship, Inc. v. Maine School Administrative District #5*, 941 F.2d 45, 47 (1st Cir. 1991), the First Circuit, in a decision joined by then-Judge Breyer, stressed that "actual practice speaks louder than words" in public forum analysis, and looked to prior uses of a school's facilities to determine that those facilities were a designated public forum. In *Stewart v. District of Columbia Armory Board*, 863 F.2d 1013 (D.C.Cir. 1988), the District of Columbia Circuit similarly underscored the importance of past speech practices and the compatibility of plaintiffs' speech with the forum, noting that "it is from such objective factual indicia that the real intent [to create a designated forum] is often inferred even when expressed intent runs counter." 863 F.2d at 1019.[19]

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[18] The Second Circuit itself has in the past looked beyond the specific speech venue at issue to determine the nature of the forum, where, as here, the government's policy encompassed multiple venues. In *Deeper Life Christian Fellowship, Inc. v. Board of Ed.*, 852 F.2d 676, 680 (2d Cir. 1988), the court affirmed a preliminary injunction ordering that a religious group be given access to a particular school, P.S. 60, on a record showing that "the School Board has opened this forum to Deeper Life through a practice of granting permits to use *public school facilities* to other religious organizations." (Emphasis added). Because the challenged policy was district-wide, the court did not limit its analysis to the particular school building Deeper Life sought to use, but looked at prior uses of all school facilities.

[19] *See also Perry Educ. Ass'n v. Perry Local Educ. Ass'n*, 460 U.S. 37, 47 (1983) ("[i]f by policy *or by practice*" the school had opened the forum, it would create a designated public forum) (emphasis added); *Cornelius v. NAACP Legal Defense & Educ. Fund, Inc.*, 473 U.S. 788, 802 (1985) ("the Court has looked to the policy and practice of the govern-

As Justice Kennedy has observed, "[i]f our public forum jurisprudence is to retain vitality, we must recognize that certain objective characteristics of Government property and its customary use by the public may control the case." *United States v. Kokinda*, 497 U.S. 720, 737-38 (1990) (Kennedy, J., concurring); *see also International Soc'y for Krishna Consciousness, Inc. v. Lee*, 505 U.S. 672, 695 (1992) (Kennedy, Blackmun, Stevens, Souter, JJ., concurring in judgment) ("the [public forum] inquiry must be an objective one, based on the actual, physical characteristics and uses of the property").

Yet the panel here ignored relevant past practice and gave no consideration to the physical characteristics of Penn Station, both of which strongly support a finding of a designated public forum for political speech. The relevant past practice that the panel ignored revealed that *under the same policy* Amtrak had for five years leased advertising space immediately in front of the Spectacular to *The Plain Truth*, and also had displayed ads for such entities as the New York Department of the Environment and a muscular dystrophy foundation. Indeed, Amtrak had never before rejected an ad as "political" anywhere in Penn Station. And objective evidence of Amtrak's policy—a contract with its advertising agent, TDI—expressly provided for the display of public service and nonprofit ads.

The need to look to such objective indicia of prior practice is especially critical here, where Amtrak relied on an unwritten, undisseminated policy that it had never before used to exclude similar speakers. The panel stressed that no political ads had been displayed on the Spectacular, but it failed to

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ment to ascertain" whether it created a designated public forum); *Concerned Women for America, Inc. v. Lafayette Cty.*, 883 F.2d 32, 33-34 (5th Cir. 1989) (looking to library's past practices to override asserted policy against use of public library for political or religious purposes); *Paulsen v. County of Nassau*, 925 F.2d 65, 70 (2d Cir. 1991) ("[o]bjective indicia of intent to create a public forum, combined with a history of consistent practice, can overcome a bare statement of contrary purpose").

note that no one had ever sought to display a political ad there before Lebron. The evidence the panel disregarded demonstrated that where people previously had sought to display political ads under the same policy, Amtrak had always permitted them to do so.

The physical characteristics of the forum also support finding a designated public forum here. The publicly-owned Penn Station is a major thoroughfare and underground mall for hundreds of thousands of New Yorkers everyday. In addition to the political ads already enumerated, Amtrak has permitted all sorts of political speech in Penn Station. Copies of *The Plain Truth* have been distributed freely from its advertising kiosk. Under the "Free Speech" access policy, anyone may receive a permit to distribute leaflets and express political points of view. News agents and booksellers advertise and sell books and magazines with political points of view throughout the station. And Amtrak has never had a complaint about political speech of any kind in the station. Thus, political speech is clearly compatible with Penn Station's other uses, in the same way political speech is compatible with a downtown sidewalk. In fact, the only thing that distinguishes the Penn Station thoroughfare from a downtown sidewalk is that it is underground.

The panel's exclusive focus on the Spectacular, and its refusal to acknowledge the relevance of Amtrak's practice of allowing political ads elsewhere in Penn Station under what Amtrak admitted was a single, stationwide policy, renders the public forum doctrine toothless. Under the panel's approach, a public school that had permitted outside Protestant and Catholic groups to use meeting rooms on its second floor could deny a Jewish group access to a larger first floor room by asserting a policy against any outside groups using school rooms. If the first floor room had not previously been used by outside groups, the school's decision would be upheld, even though other religious groups had been granted access to other rooms under the same policy. Discrimination can always

be made to look neutral by narrowing the scope of analysis to ignore cases of different treatment.

The panel's failure to consider the physical setting of the Spectacular also leads to insupportable results. As Judge Newman pointed out in dissent, App., *infra*, 20a-21a, it plainly would be unconstitutional for Amtrak to lease some billboard space in the Penn Station rotunda (where the Spectacular is located) to the Democratic Party, and simultaneously to deny the Spectacular to the Republicans on the ground that their speech violated a policy against "political" advertising in Penn Station. Yet that is effectively what Amtrak has done here. *The Plain Truth* was permitted to run an ad urging viewers to "Say No to Adultery," but Lebron was barred from displaying an ad that effectively urged viewers to "Say No to Coors." Since Amtrak has only one policy, *The Plain Truth* ad could have appeared on the Spectacular had the Worldwide Church of God asked. There is no justification for treating Lebron differently.

Had the panel examined Amtrak's objective practices in administering its policy stationwide rather than deferring to its *post hoc* justification and narrowly focusing on the Spectacular, it would have concluded that Amtrak had created a designated public forum. This Court should grant certiorari to clarify the role of objective evidence and past practice in determining the nature of a public forum.[20]

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[20] The panel majority's failure to consider the physical characteristics and prior uses of Penn Station and its advertising also creates a conflict with this Court's plurality decision in *International Soc'y of Krishna Consciousness, Inc. v. Lee*, 505 U.S. at 690-91. In that case, the Court held that a restriction on leafletting was not reasonable in light of the purposes of the forum because there was no evidence that leafletting would cause any disruption of the airport's other uses. Here, had the panel considered the evidence showing that prior political speech in Penn Station had never created a problem, it should have found Amtrak's policy unreasonable even for a nonpublic forum, just as the Court did in *Lee*. The only reason the panel gave for the policy—avoiding the appearance of favoring some political views—simply cannot be squared with the fact

III. Amtrak's Unwritten, Undefined Policy Against "Political" Advertising Is Impermissibly Vague Under This Court's Decision In *Hynes v. Mayor Of Oradell*

According to the district court's findings—none of which Amtrak challenged—the meaning of Amtrak's ban on "political" advertisements was a mystery to everyone responsible for enforcing it. As the court noted, "Amtrak's executives were themselves at odds over the meaning of the policy." App., *infra*, 17c. The panel's determination—in a single sentence, *id.* at 14a—that such a policy is not unconstitutionally vague contravenes this Court's precedents.

Even Anthony DeAngelo, the Amtrak official with ultimate responsibility for Amtrak's advertising policy, could not offer a coherent definition of it: "at times [he] indicated that the policy prohibited only those advertisements that were both 'political' *and* divisive or objectionable; at other times, he stated that the policy prohibited all advertisements that were not devoted to the selling of a product or service." App., *infra*, 17c. The latter assertion was directly contrary to written standards in the TDI-Amtrak contract governing Penn Station advertising, which expressly *permitted* noncommercial public service ads not devoted to selling a product or service. *Id.* at 19c. Another Amtrak official, who reviews advertising material submitted for the Spectacular, "knew that there was a policy barring 'political' advertisements, but he could not really say what such a policy meant." *Id.* And the policy "was not even known to many of those responsible for billboard advertising." *Id.* at 16c.

Under this Court's decisions in *Hynes* and *City of Lakewood v. Plain Dealer Publishing Co.*, 486 U.S. 750 (1988), such a policy is unconstitutionally vague. In *Hynes*, the Court held that a law requiring persons soliciting for a "political

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that Amtrak has for years allowed the display of political ads and has permitted other political speech in Penn Station, including even solicitation for political causes, without any adverse effects.

. . . cause" to obtain permits was unconstitutionally vague because the law did not define "political" cause. 425 U.S. at 621-22. *Hynes* is controlling here, as Amtrak relies on the same term, has not sought to define it, and has not even put its policy in writing. *See also Air Line Pilots Ass'n*, 45 F.3d at 1154 n.7 ("the content of the word 'political' is not immediately obvious . . . . [It] is not self-defining"); *id.* at 1162 (Flaum, J., concurring) ("the very terms 'political' or 'nonpartisan' are themselves insusceptible of principled application") (citation omitted)).

In *Lakewood*, the Court held that a policy governing access to newsboxes on public property gave the mayor "unfettered discretion," and was therefore unconstitutional. 486 U.S. at 722. The unwritten and undefined character of Amtrak's policy affords Amtrak officials similarly unguided discretion; DeAngelo said he offers his employees no instruction in the policy, and expects them to apply their "common sense." A359-60, A362-65, A386-88.

The panel upheld Amtrak's policy by likening it to the policy upheld in *Lehman*. App., *infra*, 14a. But there are two fundamental flaws in that reasoning. First, *Lehman* did not even address a vagueness claim. Second, Amtrak's policy is substantially more open-ended than the policy upheld in *Lehman*. The *Lehman* policy was in writing, and had been authoritatively construed by the Ohio Supreme Court to limit advertising space to " '[p]urveyors of goods and services saleable in commerce.' " 418 U.S. at 303-04 (*quoting Lehman v. City of Shaker Heights*, 34 Ohio St.2d 143, 146, 296 N.E.2d 683, 685 (1973)). In addition, there was "uncontradicted testimony at the trial that during the 26 years of public operation, the Shaker Heights system . . . had not accepted or permitted *any* political or public issue advertising on its vehicles." *Id.* at 300-01.[21]

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[21] In addition, *Lehman* rests on a captive audience rationale not applicable here. The Court in *Lehman* was unable to obtain a majority opinion, and the narrowest opinion upholding the result was that of Jus-

By contrast, Amtrak's policy is unwritten, undefined, contrary to its own written standards, and has been inconsistently applied. Amtrak's policy is as different from the written, consistently-applied, and authoritatively-construed policy upheld in *Lehman* as were the policies this Court invalidated in *Hynes* and *Lakewood*. The Court should grant certiorari to resolve the confusion created by the Second Circuit's misguided reliance on *Lehman*.

IV. The Court Of Appeals' Standing Analysis Conflicts With This Court's Standing Decisions, And Makes Standing For First Amendment Claims More Difficult Than For Other Legal Claims

Applying a novel and wholly unfounded standing doctrine, the panel held that Lebron lacked standing to challenge the very policy on which Amtrak relied in rejecting his adver-

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tice Douglas, who rested his opinion on the fact that riders on the bus were a "captive audience," and that speakers have no right to address a captive audience. 418 U.S. at 308 (Douglas, J., concurring). Since then, the Court has restricted the "captive audience" rationale to settings in which there is a substantial intrusion on privacy. *Erznoznick v. City of Jacksonville*, 422 U.S. 205, 209-10 n.5 (1975).

In a host of cases challenging restrictive municipal transportation facility advertising policies, *Lehman* has virtually always been distinguished, either on grounds that facially similar policies had not been consistently applied, or that the "captive audience" rationale was inapplicable. *See, e.g.*, *Air Line Pilots Ass'n*, 45 F.3d at 1153 (*Lehman* inapplicable where policy not consistently applied); *Planned Parenthood Ass'n v. Chicago Transit Auth.*, 767 F.2d 1225, 1232-33 (7th Cir. 1985) (same); *Lebron v. Washington Metropolitan Transit Auth.*, 749 F.2d 893, 896 (D.C. Cir. 1984) (*Lehman* distinguished because transit authority had accepted political ads in the past); *Hevesi v. Metropolitan Transp. Auth.*, 827 F. Supp. 1069 (S.D.N.Y. 1993) (same); *U.S. Southwest Africa/Namibia Trade & Cultural Council v. United States*, 708 F.2d 760, 767 (D.C. Cir. 1983) (distinguishing ads in bus interiors from ads in airport because "[a] person in the airports' concourses or walkways who considers an advertisement . . . objectionable enjoys the freedom simply to walk away that a passenger on a bus does not"); *Penthouse Int'l, Ltd. v. Koch*, 599 F. Supp. 1338, 1347 (S.D.N.Y. 1984) (ads posted in "open public areas of the subway stations" do not implicate "captive audience" concerns).

tisement. The Court initially reached this result on the ground that there were two separate policies—one policy that governed the Spectacular, and another that governed the rest of Penn Station.[22]

On rehearing, the panel acknowledged that there was only one policy, but left its standing analysis unaltered, reasoning that it was justified by the fact that Lebron sought access specifically to the Spectacular. App., *infra*, 3b. But the policy that barred Lebron's access to the Spectacular is Amtrak's only policy, and that policy applies throughout Penn Station. The panel thus held that Lebron lacks standing to challenge the very policy that was applied to him.

In this Court's most recent public forum cases, it has not even deemed it necessary to discuss the standing of speakers who challenge policies used to exclude them from government property. *International Soc'y for Krishna Consciousness, Inc. v. Lee*, 505 U.S. 672; *United States v. Kokinda*, 497 U.S. 720; *Perry Educ. Ass'n v. Perry Local Educ. Ass'n*, 460 U.S. 37; *Cornelius v. NAACP Legal Defense & Educ. Fund, Inc.*, 473 U.S. 788.[23] The panel's decision to deny Lebron standing to challenge the policy used to exclude him conflicts with each of these decisions.

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[22] App., *infra*, 16a ("Because we have found that Amtrak's policy against political advertisements was limited in scope to the Spectacular, Lebron's attempt to attack Amtrak's policies regarding the acceptance of advertisements in Penn Station generally, rather than on the Spectacular, amounts, in substance, to a facial challenge to those policies as they might be applied to advertisements other than Lebron's and to locations not at issue.").

[23] Indeed, the Court has routinely granted standing in First Amendment cases even *before* a statute has been applied to the plaintiff. *See, e.g., Lakewood*, 486 U.S. at 755-60 (granting standing to newspaper distributor to challenge policy governing access to newsboxes on public property); *Virginia v. American Booksellers Ass'n, Inc.*, 484 U.S. 383, 392-93 (1988) (granting standing to booksellers to challenge statute restricting display of sexually explicit material).

Like its public forum analysis, the panel's standing analysis insulates Amtrak's prior inconsistent practice from constitutional scrutiny, and thus permits the government to discriminate on content-based grounds. Moreover, the panel's decision makes it more difficult to obtain standing in First Amendment cases, a decision directly contrary to this Court's treatment of standing in the First Amendment context.[24]

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[24] The panel acknowledges this conflict, but contends that the Court's more relaxed First Amendment overbreadth standing doctrine applies only "to the conduct of the government in its role as a regulator, not as a proprietor." App., *infra*, 17a. The only two cases the panel cites to support this proposition, however, both applied overbreadth standing doctrine to policies governing speech access to government property, *i.e.*, "proprietary" decisions. *See Lakewood*, 486 U.S. at 759-62; *Board of Airport Comm'rs v. Jews for Jesus, Inc.*, 482 U.S. 569 (1987). Thus, the distinction the panel invokes is refuted by the only cases it cites to support its distinction.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

Gloria C. Phares
Paul, Hastings, Janofsky
& Walker
399 Park Avenue
New York, New York 10022
(212) 318-6000

David D. Cole
Counsel of Record
Center for Constitutional
Rights
Georgetown University Law
Center
600 New Jersey Avenue, N.W.
Washington, D.C. 20001
(202) 662-9078

R. Bruce Rich
Bernadette M. McCann Ezring
Jonathan Bloom
Marc Brotman
Weil, Gotshal & Manges LLP
767 Fifth Avenue
New York, New York 10153
(212) 310-8000

February 1996

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

No. 1494—August Term, 1994

(Argued: April 27, 1993 Decided: December 27, 1993

Reversed and Remanded: February 21, 1995

Reargued: May 11, 1995 Decided: October 30, 1995)

Docket No. 93-7127

MICHAEL A. LEBRON,

Plaintiff-Counter-Defendant-Appellee,

—vs.—

NATIONAL RAILROAD PASSENGER CORPORATION (AMTRAK),

Defendant-Appellant,

—and—

TRANSPORTATION DISPLAYS, INCORPORATED,

Defendant-Counter-Claimant.

Before:

NEWMAN, *Chief Judge*, and
LUMBARD and MAHONEY, *Circuit Judges.*

On remand from the United States Supreme Court, *see Lebron v. National R.R. Passenger Corp.*, 115 S. Ct. 961 (1995), appeal from a judgment entered February 11, 1993 in the United States District Court for the Southern District of New York, Pierre N. Leval, then-*District Judge*, that enjoined defendant-appellee National Railroad Passenger Corporation to display a political advertisement prepared by plaintiff-counter-defendant-appellee Michael A. Lebron on a large billboard known as the Spectacular in New York City's Pennsylvania Station, the district court having determined that Amtrak's failure to do so violated the First Amendment. *See Lebron v. National R.R. Passenger Corp. (AMTRAK)*, 811 F. Supp. 993 (S.D.N.Y. 1993).

We initially reversed on the ground that Amtrak is not a governmental actor subject to the strictures of the First Amendment. *Lebron v. National R.R. Passenger Corp. AMTRAK)*, 12 F.3d 388 (2d Cir. 1993). The Supreme Court reversed and remanded, but left open the question whether Amtrak's conduct violated the First Amendment. 115 S. Ct. at 974-75. We now conclude that Amtrak's historical refusal to accept political advertisements such as Lebron's on the Spectacular is a reasonable use of that forum that is neutral as to viewpoint, and that Lebron lacks standing to assert a facial challenge to Amtrak's general policies concerning the acceptance of advertising for display at Pennsylvania Station.

Reversed. Chief Judge Newman dissents in a separate opinion.

KEVIN T. BAINE, Washington, D.C. (Nicole K. Seligman, Steven M. Farina, Williams & Connolly, Washington, D.C., William G. Ballaine, Mark S. Landman, Siff Rosen P.C., New York, New York, of counsel), *for Defendant-Appellant.*

DAVID D. COLE, Washington, D.C. (Center for Constitutional Rights, Washington, D.C., R. Bruce Rich, Gloria C. Phares, Robin E. Silverman, Bernadette M. McCann Ezring, Jonathan Bloom, Weil, Gotshal & Manges, New York, New York, of counsel), *for Plaintiff-Counter-Defendant-Appellee.*

MAHONEY, *Circuit Judge*:

On remand from the United States Supreme Court, *see Lebron v. National R.R. Passenger Corp.*, 115 S. Ct. 961 (1995) ("*Lebron III*"), this appeal of a judgment entered February 11, 1993 in the United States District Court for the Southern District of New York, Pierre N. Leval, then-*District Judge*,* again comes before us. The district court enjoined defendant-appellee National Railroad Passenger Corporation ("Amtrak") and defendant-counter-claimant Transportation Displays, Incorporated ("TDI") to display a political advertisement prepared by plaintiff-counter-defendant-appellee Michael A. Lebron on a large billboard known as the Spectacular in New York City's Pennsylvania Station ("Penn Station"), having determined that Amtrak's failure to do so violated the First Amendment. *See Lebron v. National R.R. Passenger Corp. (AMTRAK)*, 811 F. Supp. 993 (S.D.N.Y. 1993) ("*Lebron I*").

On appeal, after staying the injunction, we reversed the judgment of the district court, "conclud[ing] that Amtrak is not a governmental actor subject to the strictures of the First Amendment." *Lebron v. National R.R. Passenger Corp. (AMTRAK)*, 12 F.3d 388, 389 (2d Cir. 1993) ("*Lebron II*"). The Supreme Court reversed and remanded, holding that Amtrak "is part of the Government for purposes of the First Amendment,"

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* Judge Leval became a member of the Second Circuit Court of Appeals on November 8, 1993.

Lebron III, 115 S. Ct. at 974-75, but "express[ing] no opinion as to whether Amtrak's refusal to display Lebron's advertisement violated that Amendment." *Id.* at 975.

Because we conclude that Amtrak's historical refusal to accept political advertisements such as Lebron's on the Spectacular is a reasonable use of that forum that is neutral as to viewpoint, and that Lebron lacks standing to assert a facial challenge to Amtrak's general policies concerning the acceptance of advertising for display at Pennsylvania Station, we again reverse the judgment of the district court.

Background

On November 30, 1992, Lebron, an artist who creates political billboard displays (frequently involving commentary on public issues), and TDI, which manages the leasing of advertising space for Amtrak, entered into a leasing agreement (the "Lease") under which Lebron would rent the Spectacular, "a curved back-lit display space approximately 103 feet wide by ten feet high . . . [which] dominates the west wall of the rotunda on the upper level of Penn Station where thousands of passengers pass each day," for the months of January and February 1993. *Lebron II*, 12 F.3d at 389. Although Lebron did not specify the precise nature of his display, he did inform TDI that his work was generally political. *Id.* By the terms of the Lease, " '[a]ll advertising copy is subject to approval of TDI and [Amtrak] as to character, text, illustration, design and operation. . . . [I]f [Amtrak] should deem such advertising objectionable for any reason, TDI shall have the right to terminate the contract and discontinue the service without notice.' " *Id.* (quoting the Lease, alterations partially added).

Lebron then submitted his proposed advertisement (the "Display") to TDI. Lebron characterizes the Display as "an allegory about the destructive influence of a powerful, urban, materialistic and individualistic culture on rural, community

based, family-oriented and religious cultures." The district court described the Display as follows:

> The work is a photomontage, accompanied by considerable text. Taking off on a widely circulated Coors beer advertisement which proclaims Coors to be the "Right Beer," Lebron's piece is captioned "Is it the Right's Beer Now?" It includes photographic images of convivial drinkers of Coors beer, juxtaposed with a Nicaraguan village scene in which peasants are menaced by a can of Coors that hurtles towards them, leaving behind a tail of fire, as if it were a missile. The accompanying text, appearing on either end of the montage, criticizes the Coors family for its support of right-wing causes, particularly the contras in Nicaragua. Again taking off on Coors' advertising which uses the slogan of "Silver Bullet" for its beer cans, the text proclaims that Coors is "The Silver Bullet that aims The Far Right's political agenda at the heart of America."

Lebron I, 811 F. Supp. at 995.

When TDI saw the Display, it offered Lebron any of 500 alternative billboard sites that TDI had available in New York City (none of which were in Penn Station), but Lebron rejected this offer. Echoing the allegation in his complaint that the Spectacular is "a unique advertising location in the City of New York," Lebron stated in an affidavit that:

> The very size of the Spectacular allowed me to design and visualize this work with an effectiveness and clarity that would have been otherwise impossible to achieve. Its size and shape make it one of the largest advertising display spaces in New York City, and its prominent location in Pennsylvania Station means that it is visible to a large segment of the traveling public, providing an excellent opportunity to reach exactly the kind of audience I hope to engage with the subject matter of this

> piece. For all of these reasons, I consider the space an extraordinarily unique advertising location in New York City, and a unique challenge to my communicative skills as an artist that no gallery and few other public environments could provide.

Shortly thereafter, Amtrak rejected the Display, stating that its " 'policy is that it will not allow political advertising on the [S]pectacular advertising sign.' " *Lebron II*, 12 F.3d at 389 (quoting Amtrak rejection letter, alteration in *Lebron II*).

This policy, however, is not committed to writing, *Lebron I*, 811 F. Supp. at 1001, although the licensing agreement between Amtrak and TDI (which is addressed to all of Amtrak's advertising space) states that: " 'All advertising material, exhibit material, notices and advertisements, and their manner of presentation and design, shall be subject to approval by Amtrak, which may disapprove any such items at its own discretion.' " *Id.* at 1002 (quoting licensing agreement).[1] In addition, the licensing agreement provides that public service announcements may be accepted, at a reduced rate and when space is available, although they may be preempted by commercial advertising. *Id.* at 1003. Public service advertisements may be accepted only from " 'recognized, legitimate [tax exempt] not-for-profit organizations, corporations, National, State or Local government agencies and subdivisions, philanthropic or cultural organizations whose activities would be of interest or benefit to a majority of the area population,' " and must "adhere to 'good taste, decency and community standards.' " *Id.* (quoting licensing agreement, alterations in *Lebron I*).

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[1] The licensing agreements between Amtrak's predecessor, the Pennsylvania Railroad Company ("PRC"), and TDI provided that the PRC could refuse any advertisement that it deemed " 'unlawful, immoral, improper or offensive to good taste . . . or [to] involve *political* or other views which could result in dissension or [to] involve [PRC] in dissension, complaints or controversy with its patrons or the public.' " *Lebron I*, 811 F. Supp. at 1001-02 (quoting PRC-TDI licensing agreements) (alterations partially added, emphasis added). However, this language has been superseded by the language quoted in the text of this opinion.

In this regard, Amtrak has leased advertising space to various noncommercial groups, including:

> the New York Department of the Environment, the New York Department of Commerce, a foundation for muscular dystrophy, and *Plain Truth* Magazine, a free magazine on political and social issues published by The Worldwide Church of God. In addition, testimony of the general counsel of TDI indicates that TDI regularly displays public service advertisements, including subjects such as the homeless, the environment, drunk driving, AIDS awareness, health issues, and race relations.

Id. at 1004. *The Plain Truth* is distributed at a four-sided, seven-foot kiosk that displays an advertisement for the magazine and is located in front of the Spectacular.

In addition, however, it is undisputed that in the twenty-six years of its existence, the Spectacular has never been used for any type of advertising other than commercial promotions. The only advertisements that have appeared on the Spectacular have promoted DuPont Company, Resorts International in Atlantic City, the Broadway play "Sophisticated Ladies," Fujitsu Computers, Nike athletic wear, and A & S Department Stores.[2] Moreover, as Lebron has acknowledged, Amtrak previews proposed advertisements for the Spectacular, while it views advertisements to be used at other locations only after they are exhibited.

Lebron commenced this action alleging a violation of his First Amendment rights and breach of contract, and seeking equitable relief or, alternatively, damages. The district court granted a mandatory injunction requiring Amtrak and TDI to exhibit the Display on the Spectacular. *Lebron I*, 811 F. Supp. at 1005. After holding that Amtrak is a government actor subject to the First Amendment, *id.* at 995-1000, the court con-

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[2] The stated twenty-six years of the Spectacular's existence, and the list of advertisers over that period, is premised upon the record presented on this appeal, which was completed over two years ago.

cluded that Amtrak's refusal to exhibit the Display violated that amendment. *Id.* at 1000-05. The court provided four bases for this determination: (1) Amtrak's policy of not accepting political advertisements is not clearly set forth, in that it is not reduced to writing, *id.* at 1001-02; (2) the policy is vague, in that it is difficult to draw the line between political, public interest, and commercial advertisements, as demonstrated by conflicting testimony by Amtrak's officials, *id.* at 1002-03; (3) the policy is not consistently applied, in that certain public service advertisements that Amtrak has accepted might be viewed as political, *id.* at 1003-04; and (4) the policy may be void as discriminating on the basis of viewpoint, in that Amtrak may inquire into whether a particular advertisement is offensive, *id.* at 1004-05.

As previously stated, we initially reversed on the ground that Amtrak is not subject to First Amendment constraints, and therefore did not consider the merits of Lebron's First Amendment claim. *Lebron II*, 12 F.3d at 392. We instructed the district court not to exercise supplemental jurisdiction over the remaining state law claim, but noted that Lebron would be free to pursue that claim in state court. *Id.* at 392-93. The Supreme Court reversed and remanded on the "government actor" issue, directing us to consider the merits of Lebron's First Amendment claim. *Lebron III*, 115 S. Ct. at 974-75.

We requested supplemental letter briefs from the parties, and heard reargument on the First Amendment issues.

Discussion

Because Lebron seeks access to government property, we begin with a review of the public forum doctrine.

> Under this approach, regulation of speech on government property that has traditionally been available for public expression is subject to the highest scrutiny. Such regulations survive only if they are narrowly drawn to achieve

> a compelling state interest. *Perry [Educ. Ass'n v. Perry Local Educators' Ass'n]*, 460 U.S. [37,] 45, 103 S. Ct. [948,] 955 [(1983)]. The second category of public property is the designated public forum, whether of a limited or unlimited character—property that the state has opened for expressive activity by part or all of the public. *Ibid.* Regulation of such property is subject to the same limitations as that governing a traditional public forum. *Id.*, at 46, 103 S. Ct., at 955. Finally, there is all remaining public property. Limitations on expressive activity conducted on this last category of property must survive only a much more limited review. The challenged regulation need only be reasonable, as long as the regulation is not an effort to suppress the speaker's activity due to disagreement with the speaker's view. *Ibid.*

International Soc'y for Krishna Consciousness, Inc. v. Lee, 112 S. Ct. 2701, 2705-06 (1992). Reasonable, content-neutral time, place, or manner restrictions are permissible in a public forum. *See Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989).

"[I]n defining the forum [the Supreme Court has] focused on the *access sought by the speaker*. . . . In cases in which limited access is sought, [the Court's] cases have taken a more tailored approach to ascertaining the perimeters of a forum within the confines of the government property." *Cornelius v. NAACP Legal Defense and Educ. Fund, Inc.*, 473 U.S. 788, 801 (1985) (emphasis added) (holding that federal fund-raising drive, not federal workplace generally, was relevant forum for analysis).

Amtrak contends that our public forum inquiry must focus on the Spectacular alone, rather than all Penn Station advertising space. We agree. Because of its unique size, location, and visibility, Lebron sought access only to the Spectacular, and refused to accept any other advertising space in New York City managed by TDI. Although Lebron now contends that we should broaden our public forum inquiry to all Penn Station advertising space, it was he who determined that only the Spectacular would be acceptable for his display. *Cf. Air Line*

Pilots Ass'n, Int'l v. Department of Aviation, 45 F.3d 1144, 1151-52 (7th Cir. 1995) (where speaker seeks access to diorama display cases in airport, public forum inquiry focuses on display cases rather than airport as a whole); *Hubbard Broadcasting, Inc. v. Metropolitan Sports Facilities Comm'n*, 797 F.2d 552, 555-56 (8th Cir.) (where speaker seeks access to advertising space in sports arena, public forum inquiry focuses on advertising space rather than entire arena), *cert denied*, 479 U.S. 986 (1986).

To determine the Spectacular's forum category, we must examine "the policy and practice of the government to ascertain whether it intended to designate a place not traditionally open to assembly and debate as a public forum." *Cornelius*, 473 U.S. at 802. We must bear in mind that "[t]he government does not create a public forum by inaction or by permitting limited discourse, but only by intentionally opening a nontraditional forum for public discourse." *Id.*; *see also Krishna*, 112 S. Ct. at 2706 (quoting *Cornelius*, 473 U.S. at 802). Thus, even when the government opens a forum for some speech, the forum does not become a public forum if the government did not intend to open the forum without limitation. *See United States v. Kokinda*, 497 U.S. 720, 730 (1990) (plurality opinion); *Perry Educ. Ass'n v. Perry Local Educators Ass'n*, 460 U.S. 37, 48 (1983). When only some First Amendment access has been granted, the reasonableness test applies. *Kokinda*, 497 U.S. at 730 (plurality opinion); *Perry*, 460 U.S. at 49.

Although Amtrak does not maintain a written policy with respect to the Spectacular, its practice is clear; it has never opened the Spectacular for anything except purely commercial advertising. *See Air Line Pilots Ass'n*, 45 F.3d at 1154 ("a court must examine the *actual* policy - as gleaned from the *consistent* practice with regard to various speakers - to determine whether a state intended to create a designated public forum"); *cf. AIDS Action Comm. v. Massachusetts Bay Transp. Auth.*, 42 F.3d 1, 10-12 (1st Cir. 1994) (prohibiting advertisements concerning

use of condoms pursuant to written policy prohibiting sexually explicit advertisements constituted "discrimination in the application of supposedly neutral standards" when other sexually explicit advertisements had been allowed).

In light of Amtrak's undisputed practice with respect to the Spectacular, therefore, we conclude that the Spectacular is not a public forum; most likely, it is a nonpublic forum, or perhaps it is a limited public forum opened for purely commercial speech. *See Calash v. City of Bridgeport*, 788 F.2d 80, 83-84 (2d Cir. 1986) (sports arena opened only to civic, charitable, and nonprofit groups either a nonpublic forum or a limited public forum not required to accommodate other members of general public).

Accordingly, Amtrak's policy of excluding noncommercial advertisements from the Spectacular will be upheld so long as the policy is "viewpoint-neutral and reasonable in relation to the forum's purpose." *Calash*, 788 F.2d at 84; *see also Cornelius*, 473 U.S. at 806 ("Control over access to a nonpublic forum can be based on subject matter and speaker identity so long as the distinctions drawn are reasonable in light of the purpose served by the forum and are viewpoint neutral.").

Lehman v. City of Shaker Heights, 418 U.S. 298 (1974), is particularly well addressed to this issue as presented in the instant case. In *Lehman*, the city imposed a ban on political advertisements in buses, but allowed other types of advertisements, including commercial and public service ads. A candidate for public office challenged this policy as a First Amendment violation, and the Court responded as follows:

> Here, we have no open spaces, no meeting hall, park, street corner, or other public thoroughfare. Instead, the city is engaged in commerce. It must provide rapid, convenient, pleasant, and inexpensive service to the commuters of Shaker Heights. The car card space, although incidental to the provision of public transportation, is part

of the commercial venture. In much the same way that a newspaper or periodical, or even a radio or television station, need not accept every proffer of advertising from the general public, a city transit system has discretion to develop and make reasonable choices concerning the type of advertising that may be displayed in its vehicles. In making these choices, this Court has held that a public utility "will be sustained in its protection of activities in public places when those activities do not interfere with the general public convenience, comfort and safety." *Public Utilities Comm'n v. Pollak*, 343 U.S. [451,] 464-65 [(1952)].

Because state action exists, however, the policies and practices governing access to the transit system's advertising space must not be arbitrary, capricious, or invidious. . . . Revenue earned from long-term commercial advertising could be jeopardized by a requirement that short-term candidacy or issue-oriented advertisements be displayed on car cards. Users would be subjected to the blare of political propaganda. There could be lurking doubts about favoritism, and sticky administrative problems might arise in parceling out limited space to eager politicians. In these circumstances, the managerial decision to limit car card space to innocuous and less controversial commercial and service oriented advertising does not rise to the dignity of a First Amendment violation. . . .

No First Amendment forum is here to be found. The city consciously has limited access to its transit system advertising space in order to minimize chances of abuse, the appearance of favoritism, and the risk of imposing upon a captive audience. These are reasonable legislative objectives advanced by the city *in a proprietary capacity*. In these circumstances, there is no First or Fourteenth Amendment violation.

Lehman, 418 U.S. at 303-04 (plurality opinion) (emphasis added).[3]

It is especially significant that, as in *Lehman*, Amtrak acts in this case in a proprietary capacity, rather than as a governmental regulator. As the Court stated in *Krishna*:

> Where the government is acting as a proprietor, managing its internal operations, rather than acting as lawmaker with the power to regulate or license, its action will not be subjected to the heightened review to which its actions as a lawmaker may be subject. *Kokinda*, *supra*, 497 U.S., at [725], 110 S. Ct., at [3119] (plurality opinion) (citing *Cafeteria & Restaurant Workers v. McElroy*, 367 U.S. 886, 896, 81 S. Ct. 1743, 1749, 6 L.Ed.2d 1230 (1961)). Thus, we have upheld a ban on political advertisements in city-operated transit vehicles, *Lehman v. City of Shaker Heights*, 418 U.S. 298, 94 S. Ct. 2714, 41 L.Ed.2d 770

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[3] Lebron contends that because the only government interest in *Lehman* that garnered the support of a majority of the Court is protecting captive audiences, the case must be read as so limited. However, the Supreme Court has repeatedly reaffirmed a broader reading of *Lehman*, often specifically citing to the plurality opinion. *See, e.g.*, *Krishna*, 112 S. Ct. at 2705 ("we have upheld a ban on political advertisements in city-operated transit vehicles") (citing *Lehman*); *Kokinda*, 497 U.S. at 726 (plurality opinion) ("In *Lehman*, the plurality concluded that the ban on political advertisements (combined with the allowance of other advertisements) was permissible under [the arbitrary and capricious] standard") (followed by quotation from *Lehman*, 418 U.S. at 304) (plurality opinion); *Cornelius*, 473 U.S. at 806 ("a speaker may be excluded from a nonpublic forum if he wishes to address a topic not encompassed within the purpose of the forum") (citing *Lehman*); *Perry*, 460 U.S. at 47 ("[I]n *[Lehman]* (opinion of BLACKMUN, J.), a plurality of the Court concluded that a city transit system's rental of space in its vehicles for commercial advertising did not require it to accept partisan political advertising."); *see also Air Line Pilots Ass'n*, 45 F.3d at 1153 n.3 (declining "to limit *Lehman*'s holding to situations involving captive audiences"); *Calash*, 788 F.2d at 84 (citing *Lehman* plurality opinion for proposition that "rental of space to commercial advertisers does not require City to accept political advertising on buses"). We therefore see no need to address Amtrak's argument that its policy could be justified on the basis of the captive audience doctrine.

> (1974), even though the city permitted other types of advertising on those vehicles. Similarly, we have permitted a school district to limit access to an internal mail system used to communicate with teachers employed by the district. *Perry Education Assn. v. Perry Local Educators' Ass'n*, 460 U.S. 37, 103 S. Ct. 948, 74 L.Ed.2d 794 (1983).

112 S. Ct. at 2705.

Amtrak's decision, as a proprietor, to decline to enter the political arena, even indirectly, by displaying political advertisements is certainly reasonable. Amtrak's position as a government controlled and financed public facility, used daily by thousands of people, made it highly advisable to avoid the criticism and the embarrassments of allowing any display seeming to favor any political view. This was particularly so with respect to the Spectacular in view of its uniqueness and size. *Cf. Calash*, 788 F.2d at 84 (finding the city's decision to limit access to sports arena to civic, charitable, and nonprofit groups, but not rock musicians, reasonable) (citing *Cornelius*, 473 U.S. at 809-11); *Perry*, 460 U.S. at 50-53; and *Lehman*, 418 U.S. at 304 (plurality opinion)). Nor would a policy against "political" advertising on the Spectacular be void for vagueness in light of the Supreme Court's decision in *Lehman*, 418 U.S. at 303-04 (plurality opinion).

Lebron urges us to reach the same conclusion as the district court, arguing that Amtrak's policy is unwritten, inconsistently applied, and possibly viewpoint biased. We disagree.

The fact that a policy is not committed to writing does not of itself constitute a First Amendment violation. *Cf. City of Lakewood v. Plain Dealer Publishing Co.*, 486 U.S. 750, 770 (1988) ("[T]he limits the city claims are implicit in its law must be made explicit by textual incorporation, binding judicial or administrative construction, or well-established practice."). *City of Lakewood* and the other cases cited by the district court stand for the propositions that "in the area of free expression a

licensing statute placing unbridled discretion in the hands of a government official or agency constitutes a prior restraint and may result in censorship," *id.* at 757, and that "the absence of express standards makes it difficult to distinguish, 'as applied,' between a licensor's legitimate denial of a permit and its illegitimate abuse of censorial power." *Id.* at 758.

Neither of these concerns is implicated here. Amtrak's prior written agreements, together with the testimony of the Amtrak official responsible for approving advertisements on the Spectacular and Amtrak's historic practice of reserving the Spectacular for commercial advertisements, dispel the notion that Amtrak enjoyed "unbridled discretion" or could have perpetrated an "illegitimate abuse of censorial power" in rejecting an advertisement because of its political content. Furthermore, because the policy against political advertisements was limited in scope to the Spectacular, there is no evidence that Amtrak's policy has ever been applied inconsistently.

The district court also intimated that Amtrak's policy might be void for viewpoint bias, depending upon which of the conflicting versions offered at trial represented Amtrak's true policy. Although the district court entered no findings of fact, its concern was primarily based upon statements appearing in Amtrak's 1967 and 1980 agreements with TDI, which gave Amtrak the discretion to refuse any advertising that "involve[s] political or other views which could result in dissension or involve [Amtrak] in dissension, complaints or controversy with its patrons or the public." 811 F. Supp. at 1001-02 (quoting TDI licensing agreements) (alterations partly added). Of course, if such a policy were used to screen out only controversial political advertisements—that is, political advertisements distasteful to the majority—it would be void for viewpoint bias. On the other hand, it seems more sensible to read the language as a justification, however inartfully phrased, for a categorical ban against political advertising, *see, e.g.*, *Lehman*, 418 U.S. at 304 (characterizing commercial advertising as "innocuous and less controversial" than political advertising), rather than as a test

for discriminating against certain types of political advertisements.[4]

Because we have found that Amtrak's policy against political advertisements was limited in scope to the Spectacular, Lebron's attempt to attack Amtrak's policies regarding the acceptance of advertisements in Penn Station generally, rather than on the Spectacular, amounts, in substance, to a facial challenge to those policies as they might be applied to advertisements other than Lebron's and to locations not at issue. Ordinary rules of standing, of course, would bar Lebron from mounting such a challenge. As the Supreme Court has made clear: "Embedded in the traditional rules governing constitutional adjudication is the principle that a person to whom a statute may constitutionally be applied will not be heard to challenge that statute on the ground that it may conceivably be applied unconstitutionally to others, in other situations not before the Court." *Broadrick v. Oklahoma*, 413 U.S. 601, 610 (1973) (collecting cases).

Further, "[t]he question of standing is not subject to waiver . . . : 'we are required to address the issue even if the courts below have not passed on it, and even if the parties fail to raise the issue before us. The federal courts are under an independent obligation to examine their own jurisdiction, and standing "is perhaps the most important of [the jurisdictional]

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[4] Lebron invokes *Lamb's Chapel v. Central Moriches Union Free School District*, 113 S. Ct. 2141 (1993), which invalidated a ban on the showing of religiously oriented films in public schools when secularly oriented films on the identical subjects were permitted, to argue that Amtrak's policy violates viewpoint neutrality. Lebron perceives viewpoint discrimination because "[u]nder Amtrak's policy, the Coors Brewing Company could advertise and *encourage* purchase of its beer, but Lebron's critical treatment of the same subject matter, *discouraging* purchase of Coor's beer, was rejected because it expressed a 'political' point of view." The argument is plainly specious. The "subject matter" of the Display can hardly be described, with any remote sense of accuracy, as the merits or demerits of Coors Beer. As Lebron himself stated in an affidavit, "I do not seek to sell anything other than ideas with this advertisement."

doctrines." ' " *United States v. Hays*, 115 S. Ct. 2431, 2435 (1995) (quoting *FW/PBS, Inc. v. City of Dallas*, 493 U.S. 215, 230-31 (1990) (quoting *Allen v. Wright*, 468 U.S. 737, 750 (1984))) (alteration in *FW/PBS*).

Broadrick also recognized, however, that "the Court has altered its traditional rules of standing to permit—in the First Amendment area—'attacks on overly broad statutes with no requirement that the person making the attack demonstrate that his own conduct could not be regulated by a statute drawn with the requisite narrow specificity.' " *Id.* at 612 (quoting *Dombrowski v. Pfister*, 380 U.S. 479, 486 (1965)). *Broadrick* went on to emphasize that this overbreadth doctrine "has been employed by the Court sparingly and only as a last resort." *Id.* at 613; *see also Younger v. Harris*, 401 U.S. 37, 52 (1971) ("Procedures for testing the constitutionality of a statute 'on its face' . . . are fundamentally at odds with the function of the federal courts in our constitutional plan.").

In our view, this case affords no occasion for application of the overbreadth doctrine, and Lebron accordingly lacks standing to assert a general challenge to Amtrak's advertising policies. The doctrine has only been applied to the conduct of the government in its role as a regulator, not as a proprietor. *See e.g., City of Lakewood*, 486 U.S. at 759-62 (newspaper permitted to mount facial challenge to ordinance that granted municipal mayor uncircumscribed authority to allow or disallow distribution of newspapers via newsracks on public streets); *Board of Airport Comm'rs v. Jews for Jesus, Inc.*, 482 U.S. 569, 571, 574-77 (1987) (allowing overbreadth challenge to ordinance that barred "First Amendment activities within the Central Terminal Area at Los Angeles International Airport"). It is invoked against a statute that " 'threatens others not before the court - those who desire to engage in legally protected expression but who may refrain from doing so rather than risk prosecution or undertake to have the law declared partially invalid,' " *id.* at 574 (quoting *Brockett v. Spokane Arcades, Inc.*, 472 U.S. 491, 503 (1985)), and invalidation of a statute on

its face is permitted "only if the overbreadth is 'substantial.' " *Id.* (collecting cases).

Such concerns simply are not implicated by Amtrak's role as the proprietor of Penn Station, essentially seeking to derive revenues from the sale of advertising while minimizing interference with or disruption of the station's commercial function. *See Lehman*, 418 U.S. at 303 (plurality opinion). Thus, Lebron lacks standing to present a facial challenge to Amtrak's general advertising policies in this litigation. This would be so even if Lebron had adduced a stronger showing of erosion of Amtrak's policy against political advertisements than the handful of assertedly borderline cases that was presented in this litigation. As Chief Judge Newman pointed out in *Lebron II*, "Amtrak's billboard space in Pennsylvania Station, even if used in the past for ads of a public service nature, has not become a forum for ads of such pointed political content as Lebron's attack on the makers of Coors Beer for promoting 'The Far Right's political agenda.' " 12 F.3d at 394 (Newman, C.J., dissenting).

Conclusion

We reverse the judgment of the district court and remand with the instruction that the district court dismiss Lebron's complaint. As previously noted, *see Lebron II*, 12 F.3d at 392-393, Lebron is free to pursue his state law claim in state court.

JON O. NEWMAN, *Chief Judge*, dissenting:

Because I believe that Amtrak, a governmental entity now authoritatively determined to be subject to First Amendment limitations, *see Lebron v. National R.R. Passenger Corp.*, 115 S. Ct. 961 (1995), has violated the First Amendment by its rejection of the political advertisement that Michael Lebron

contracted to display on a billboard in Penn Station, I respectfully dissent.

The Court's dismissal of Lebron's lawsuit rests on two premises, both of which, in my view, are flawed. The first concerns the identification of the forum for purposes of applying public forum analysis. The second concerns the standard for determining whether a governmental actor's policy for rejecting advertisements violates First Amendment requirements.

1. *The relevant forum.* The premise of the Court's identification of the relevant forum is that, in advertising cases, a court should consider the particular billboard on which an applicant wishes to display a message. Proceeding from this premise, the Court narrows its inquiry to "the Spectacular," the large billboard high on the west wall of the rotunda of the upper level of Penn Station. No prior case has taken such a restricted view of the relevant forum, and I think it can be readily demonstrated that the Court's premise is incorrect.

The Supreme Court has instructed that the relevant forum is to be determined by "the access sought by the speaker." *Cornelius v. NAACP Legal Defense and Educational Fund, Inc.*, 473 U.S. 788, 801 (1985). The meaning of that instruction is made clear by the facts of *Cornelius*. The plaintiff sought access to what the Court called "a particular means of communication," *id.*—the Combined Federal Campaign, a charity drive aimed at federal employees. The Court ruled that the charity campaign itself was the relevant forum, rather than the entirety of the federal workplace. The cases relied on by *Cornelius* further illuminate the Court's meaning. In *Perry Education Assn. v. Perry Local Educators' Assn.*, 460 U.S. 37 (1983), the Court confined its inquiry to a school district's interschool mail system, rather than all parts of school property. *Cornelius* referred to the mail system as "a particular *means* of communication." 473 U.S. at 801 (emphasis added). In *Lehman v. City of Shaker Heights*, 418 U.S. 298 (1974), the Court confined its inquiry to advertising space on city-owned buses.

All of these cases focus on a means of communication, not the particular location where an advertiser prefers to display its ad. It is unimaginable that in *Cornelius* the Court would have permitted one political party to solicit funds through the Combined Federal Campaign at one side of the lobby of a federal building while denying another party the opportunity to solicit funds through the Campaign at the other side, or that in *Perry* the Court would have permitted one group to place a political message in the mail boxes of one school while denying another group a similar right at other schools, or that in *Lehman* the Court would have permitted political ads on one bus while prohibiting political ads on other buses.

The two cases relied on by the majority in the pending appeal, both interestingly and accurately cited with a signal meaning "compare," are also instructive. In *Air Line Pilots Assn. v. Dept. of Aviation*, 45 F.3d 1144 (7th Cir. 1995), the Court focused on diorama display cases throughout an airport, rather than the entirety of the airport. The Court did not limit its analysis to one display case. In *Hubbard Broadcasting, Inc. v. Metropolitan Sports Facilities Commission*, 797 F.2d 552 (9th Cir.), *cert. denied*, 479 U.S. 986 (1986), the Court focused on all advertising space in a sports arena, rather than the entirety of the arena. The Court did not limit its analysis to one portion of the advertising space.

Nevertheless, the Court in the pending case limits its public forum analysis to the one billboard in Penn Station on which Lebron wishes to display his ad—the so-called "Spectacular." There is no question that this billboard is bigger than any other in Penn Station, more visible, and, if one can afford it, more desirable. But public forum analysis cannot be so particularized as to focus on one of several billboards on government property, no matter how preferable that one billboard's size and location may be to an advertiser. The reason can be readily demonstrated. As everyone who has ever walked through Penn Station knows, the Spectacular is high atop the west wall of the station's rotunda, and two small billboards are

high atop the north and south walls of the same rotunda. If Amtrak had permitted the Democratic Party to place political ads on either of the two smaller billboards in the rotunda, can it be seriously argued that any court would limit its forum analysis to the one large billboard and permit Amtrak to deny the Republican Party the opportunity to place its political ad on the Spectacular, just because no political ad had previously been on that precise space?

The relevant forum must be at least advertising space in the rotunda of Penn Station—the means of communication to which Lebron sought access. Once the forum is defined to have at least this scope, Amtrak's violation of the First Amendment is evident because it has leased advertising space on a kiosk in the rotunda for *The Plain Truth*, a magazine the Court acknowledges is devoted to "political and social issues." It is clearly unconstitutional for Amtrak to permit its advertising space in the rotunda to be used to convey the message of *The Plain Truth* and deny space in the same rotunda to the message that Lebron believes conveys the plain truth about the brewers of Coors Beer.

2. *Amtrak's policy.* Even if the relevant forum is the one billboard space known as The Spectacular, the Court's second premise—that the scope and lawfulness of Amtrak's exercise of discretion regarding political ads may be ascertained solely from its past practice—is also unsound. The proper inquiry, the Supreme Court has instructed, focuses not solely on past practice but on "policy and practice," *Cornelius*, 473 U.S. at 802; *see Lehman*, 418 U.S. at 303 ("policies and practices"). If it were the case that the only evidence of Amtrak's approach to political ads was its past practice, an inquiry confined to that practice would be defensible. But the record in this case contains more evidence, and the District Court made findings based on that evidence that are not even arguably clearly erroneous.

First, the agreement between Amtrak and Transportation Displays Incorporated (TDI), the leasing agent for billboards

in Penn Station, states, "All advertising material, exhibit material, notices and advertisements, and their manner of presentation and design, shall be subject to approval by Amtrak, which may disapprove any such items at its own discretion." *Lebron v. National R.R. Passenger Corp.*, 811 F. Supp. 993, 1002 (S.D.N.Y. 1993). It is difficult to imagine a more standardless statement of policy. Second, as the District Court found, neither the key Amtrak official responsible for supervising Amtrak's arrangements with TDI nor any of the executives of TDI knew of any prohibition on political advertising at any of Amtrak's facilities. *Id.* Third, other key Amtrak officials could not agree on what Amtrak's policy was. One testified that the policy prohibited only those advertisements that were both "political and divisive or objectionable," while another could not say what the policy meant. *Id.* Fourth, the guidelines of Amtrak's leasing agent, TDI, do not prohibit political advertisements but merely consider them commercial and therefore subject to full rate charge. *Id.* at 1003.

In view of this evidence, the District Court's findings that Amtrak's alleged policy against political ads was unwritten, unclear, and undisseminated provide ample basis for the Court's ultimate conclusion that the policy permitted the unfettered exercise of discretion and created the risk of abuse that the First Amendment prohibits. *See Lebron v. Washington Metropolitan Area Transit Authority*, 749 F.2d 893, 899 (D.C. Cir. 1984).

Disregarding the evidence and the District Judge's findings, this Court ascertains Amtrak's policy solely by looking to the past practice of not yet contracting for a political ad on the Spectacular. But where a policy is unwritten, unclear, and undisseminated, the fact that it has not yet been used discriminatorily does not save it from invalidation under the First Amendment. The vice of conferring unfettered discretion on government officials to determine which messages may be conveyed is not avoided by their past pattern of not making a discriminatory decision. The vice inheres in the opportunity for

discrimination, and the First Amendment requires that opportunity to be held to an acceptable minimum by a clear and well understood policy that appropriately limits the discretion of the officials who must administer it. *See Gentile v. State Bar of Nevada*, 111 S. Ct. 2720, 2732 (1991) (imprecise standards concerning permissible statements by lawyers); *Lakewood v. Plain Dealer Publishing Co.*, 486 U.S. 750, 755-59 (1988) (unfettered discretion to permit newspaper dispensing devices on governmental property). As the Supreme Court has observed,

> The prohibition against vague regulations of speech is based in part on the need to eliminate the impermissible risk of discriminatory enforcement. . . . The question is not whether discriminatory enforcement occurred here, and we assume it did not, but whether the Rule is so imprecise that discriminatory enforcement is a real possibility."

Gentile, 111 S. Ct. at 2732 (citations omitted). In some cases, it might be possible to infer the existence of a policy that passes constitutional muster from a record consisting solely of a pattern of past practice. But in the pending case such a policy cannot be inferred from past practice in the face of substantial evidence that has persuaded a District Judge to make findings that the alleged policy was not understood by the officials responsible for administering it.

Wholly apart from the absence of a clear, understandable, and understood policy, Lebron might be correct that, to the extent that the defendant's policy purports to bar political ads, it is a viewpoint-based discrimination that violates the First Amendment. *See Air Line Pilots Assn. v. Department of Aviation*, 45 F.3d 1144 (7th Cir. 1995). As Lebron contends, the defendants are willing to display an ad urging the public to buy Coor's beer but are unwilling to display his ad urging the public not to do so. He makes a substantial argument that viewpoint-based discrimination is occurring when government allows an ad promoting the sale of a product, but purports to

prohibit an ad opposing a product because of the views of its manufacturer. Presumably, Amtrak would allow an ad opposing the sale of Coor's beer because of its alcoholic content or for any reason unrelated to the views of its manufacturer. I need not decide whether to accept Lebron's argument since his other positions are well supported on this record.

In my view, the District Court's findings, fully supported by the evidence, entitled Lebron to prevail on his claim that Amtrak's refusal to permit display of his ad violated the First Amendment. At a minimum, he is entitled to a declaration that Amtrak has violated the First Amendment, damages (to the extent, if any, not precluded by *F.D.I.C. v. Meyer*, 114 S. Ct. 996, 1004-06 (1994)), and equitable relief requiring promulgation and dissemination of a clear policy concerning political ads. Since the Court concludes that Amtrak has no liability at all, I need not consider the further issue of whether the equitable relief ought to include a requirement that Lebron's ad be displayed. My statement from the prior appeal, 12 F.3d at 394 (Newman, C.J., dissenting), quoted by the Court out of its context, was directed solely at the issue of the possible scope of relief, not the issue of liability on which the Court today rules.

I respectfully dissent.

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

No. 1494—August Term, 1992

(Argued: April 27, 1993 Decided: December 27, 1993

Reversed and Remanded: February 21, 1995

Reargued: May 11, 1995 Decided: October 30, 1995

On rehearing: December 29, 1995)

Docket No. 93-7127

MICHAEL A. LEBRON,

Plaintiff-Counter-Defendant-Appellee,

—vs.—

NATIONAL RAILROAD PASSENGER CORPORATION (AMTRAK),

Defendant-Appellant,

—and—

TRANSPORTATION DISPLAYS, INCORPORATED,

Defendant-Counter-Claimant.

Before:

NEWMAN, *Chief Judge*, and
LUMBARD and MAHONEY, *Circuit Judges*.

Opinion on rehearing of this Court's October 30, 1995 reversal of the judgment of the United States District Court for the Southern District of New York, Pierre N. Leval, *Judge*, that granted an injunction to plaintiff-counter-defendant-appellee Michael A. Lebron requiring defendant-appellant National Railroad Passenger Corporation (Amtrak) and defendant-counter-claimant Transportation Displays, Incorporated to display a political advertisement prepared by Lebron on a large billboard known as the Spectacular in New York City's Pennsylvania Station. The petition for rehearing is denied. Chief Judge Newman dissents in a separate opinion.

GLORIA C. PHARES, New York, New York, (Paul, Hastings, Janofsky & Walker, New York, New York, R. Bruce Rich, Bernadette McCann Ezring, Jonathan Bloom, Marc Brotman, Weil, Gotshal & Manges, New York, New York, David D. Cole, Center for Constitutional Rights, Washington, D.C., of counsel), *for Plaintiff-Counter-Defendant-Appellee.*

KEVIN T. BAINE, Washington, D.C. (Nicole K. Seligman, Steven M. Farina, Williams & Connolly, Washington, D.C., William G. Ballaine, Mark S. Landman, Siff Rosen P.C., New York, New York, of counsel), *for Defendant-Appellant.*

MAHONEY, *Circuit Judge*:

Plaintiff-Counter-Defendant-Appellee Michael A. Lebron petitions for rehearing of this Court's decision in *Lebron v.*

National Railroad Passenger Corp. (Amtrak), No. 93-1727, [App., *supra*, 1a] (2d Cir. Oct. 30, 1995) ("*Lebron I*"), familiarity with which is assumed. We deny the petition for rehearing, but amend *Lebron I* as follows:

1. The sentence at [App., *supra*, 15a, lines 14-17], is deleted.

2. The sentence at [App., *supra*, 16a, lines 3-9], is amended to read as follows:

> Because Lebron insisted that TDI display his proposed advertisement only on the Spectacular, his attempt to attack Amtrak's policies regarding the acceptance of advertisements in Penn Station generally, rather than on the Spectacular, amounts, in substance, to a facial challenge to those policies as they might be applied to advertisements other than Lebron's and to locations not at issue.

3. The two sentences at [App., *supra*, 18a, lines 19-22], are replaced by the following:

> We reverse the judgment of the district court and remand for consideration of Lebron's contract claim and TDI's counterclaim for a declaratory judgment that it is entitled to terminate the Lease. Because initial subject matter jurisdiction over Lebron's federal claim is now clear, and a full trial has been "conducted on an expedited basis, upon written submissions," *Lebron I*, 811 F. Supp. at 994, the interests of judicial economy and fairness to the parties counsel that this litigation be completed in federal court.

We note the assertion in Chief Judge Newman's dissent from this disposition of the petition for rehearing that we now approve an inconsistent Amtrak policy because, "as the District Court found, advertisements falling within a broad category of political messages had been displayed in Penn Station." Judge Leval concluded only that a handful of the

advertisements shown in Penn Station over the years had been "arguably 'political.' " *Lebron v. National R.R. Passenger Corp. (Amtrak)*, 811 F. Supp. 993, 1004 (S.D.N.Y. 1993) (referring to advertisements by New York Department of the Environment, New York Department of Commerce, a foundation for muscular dystrophy, and *Plain Truth* magazine; and public service advertisements concerning "subjects such as the homeless, the environment, drunk driving, AIDS awareness, health issues, and race relations"). Amtrak is probably entitled to consider such advertisements as "public service announcements" within the meaning of its standard licensing agreement. *See Lebron I*, [App., *supra*, 6a-7a]. In any event, "Amtrak's billboard space in Pennsylvania Station, even if used in the past for ads of a public service nature, has not become a forum for ads of such pointed political content as Lebron's attack on the makers of Coors beer for promoting 'the Far Right's political agenda.' " *Lebron v. National R.R. Passenger Corp.*, 12 F.3d 388, 394 (2d Cir 1993) (Newman, C.J., dissenting), *rev'd and remanded*, 115 S. Ct. 961 (1995).

We rely upon *Lebron I* with respect to our analysis of the forum issue. *See id.*, [App., *supra*, 8a-14a].

JON O. NEWMAN, *Chief Judge*, dissenting:

I respectfully dissent from the denial of the petition for rehearing.

When the Court first issued its opinion on the merits of Lebron's First Amendment challenge, it premised substantial portions of its ruling on the view that Amtrak's advertising policy on political messages, whatever the policy's content, was limited in geographic scope to the one large billboard in Penn Station known as "the Spectacular." Lebron's petition for rehearing challenges that premise, pointing out unrefuted contrary evidence in the record, a contrary assumption, if not

a finding, underlying the District Court's analysis, and the acknowledgement by Amtrak in its appellate brief that its policy "applies to all advertising in Amtrak's facilities." Brief for Appellant at 7. The Court responds to Lebron's petition by amending its opinion to delete the two passages of the opinion as originally issued that had asserted that Amtrak's policy against political advertisements is limited to the Spectacular.

Though the deletions are fully justified, they leave the Court's legal analysis of Lebron's First Amendment challenge even more vulnerable than I thought it was at the time of the original opinion. *See* ___ F.3d ___, ___ (Newman, C.J., dissenting). For example, the original opinion had concluded that there is no evidence that Amtrak's policy has ever been applied inconsistently "because the policy against political advertising was limited in scope to the Spectacular." Id. at ___. The revised recognition that Amtrak's policy, whatever its content, is not limited in scope to the Spectacular leaves unsupported the majority's view that the policy has not been applied inconsistently. In fact, as the District Court found, advertisements falling within a broad category of political messages had been displayed in Penn Station.[1] The majority has concluded that the policy has been consistently applied by overlooking the instances where it has not been consistently applied. This conclusion, previously reached on

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[1] The majority again notes, as it did in the initial opinion on the merits, that my dissent from the very first *Lebron* ruling had observed that Penn Station "has not become a forum for ads *of such pointed political content* as Lebron's [proposed ad for the Spectacular.]" 12 F.3d at 394 (emphasis added). The fact that the ads Amtrak previously allowed in Penn Station were only of a general political nature and did not contain political content as "pointed" as Lebron's ad does not detract in any way from the District Court's finding, supported by abundant evidence, that the Amtrak policy has been inconsistently applied. Whether the difference between Lebron's ad and prior ads should have a bearing on the scope of relief, which is the issue I discussed in the prior dissent, is an issue entirely different from whether Amtrak has incurred liability for applying its "policy" inconsistently in violation of the First Amendment.

a view that the policy applied only to one location, is left in place, even though there is now recognition that the policy applies throughout Amtrak's facilities.

Perhaps the majority now means to rest its ultimate conclusion solely on its view that the relevant forum for purposes of public forum analysis is only the Spectacular. I previously set forth my reasons for thinking that that view is not legally sound. *See id.* at ___-___. With the factual underpinning of the majority's view as to the scope of the Amtrak policy now discarded, I simply note that the public forum view of the majority, even if correct, is irrelevant since, no matter what the scope of the forum, a governmental entity violates the First Amendment when it bars display of political messages pursuant to a "policy" that has been found by a fact-finder, with abundant evidentiary support, to be vague, unwritten, undisseminated, unclear to those who must administer it, and inconsistently applied. In *Board of Airport Commissioners v. Jews for Jesus, Inc.*, 482 U.S. 569 (1987), the Supreme Court found it unnecessary to decide whether the Los Angeles International Airport was a public forum because the governmental ordinance regulating speech on the premises was constitutionally defective. *Id.* at 573-74. The constitutional defects in Amtrak's "policy" similarly make public forum analysis irrelevant.

I agree with the majority that the state law issues are properly returned to the District Court for further consideration, but I would grant the petition for rehearing.

APPENDIX C

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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92 Civ. 9411 (PNL)

Dated: February 5, 1993

As Amended February 8, 1993

MICHAEL A. LEBRON,

Plaintiff,

—v.—

THE NATIONAL RAILROAD PASSENGER CORPORATION (AMTRAK) and TRANSPORTATION DISPLAYS INCORPORATED,

Defendants.

OPINION AND ORDER

Findings of Fact and Conclusion of Law

PIERRE N. LEVAL, U.S.D.J.

This is a so-called "Bivens" action,[1] brought under the First Amendment by an artist, Michael A. Lebron, would-be lessor of a gigantic billboard in New York's Pennsylvania Station. The primary defendant is Amtrak, the National Passenger Railroad Corporation, which, as owner of the billboard, rejected the two-month lease plaintiff had contracted for with Amtrak's leasing agent because plaintiff's display was "polit-

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[1] *See Bivens v. Six Unknown Named Agents*, 403 U.S. 388 (1971).

ical." Plaintiff contends the rejection was inconsistent with the requirements of the First Amendment. He sues to invalidate the rejection so that he can obtain the benefit of his lease agreement.

As an alternative theory, plaintiff alleges that Amtrak and its leasing agent Transportation Displays Incorporated ("TDI"), the second defendant, are estopped by reason of delay from denying plaintiff's contract.

On the consent of the parties, trial was conducted on an expedited basis, upon written submissions. The court's findings of fact and conclusions of law are as follows.

Background

Lebron is an artist who creates works for display on billboards. His works often involve commentary on public issues. *See, e.g., Lebron v. Washington Metropolitan Area Transit Authority*, 749 F.2d 893 (D.C. Cir. 1984). During 1991 and 1992, he made plans for a photomontage for a particular billboard in Penn Station. The billboard is known as the Spectacular; it is a curved, back-lit display space approximately 103 feet wide and 10 feet high, covering the east-facing wall of the rotunda area, facing passengers (and others) who walk westward toward the waiting areas, ticket booths, and train platforms.

Defendant TDI is an advertising agency that handles the leasing of billboards for many of Amtrak's properties and for other billboard owners in the rail transportation system. Amtrak has authorized TDI to lease the billboards in Penn Station. While the licensing agreement reserves for Amtrak the right of approval of all advertising copy, in practice, Amtrak does not review advertising copy, excepting advertisements for the Spectacular.

In August 1991, Lebron first contacted TDI about contracting for billboard space in Penn Station. He spoke from time to time with William B. Schwartz, a TDI account executive. Schwartz told him that while no displays would be

accepted that included obscenity or violence, there were no other policy restrictions on advertising.

The Spectacular was available for two months at the beginning of 1993. Lebron and TDI reached agreement on financial terms of $18,500 a month for January and February 1993. In August 1992, Schwartz gave Lebron the standard rental form contract, which Lebron signed and returned. During the negotiations, Schwartz asked Lebron what he would display on the billboard. Lebron responded that in general his work was political, although it often looked like advertising, but that he preferred to keep confidential the specific content of the work he was creating for the Spectacular. Schwartz did not suggest that the political nature of the work would be a problem.

On November 30, 1992, TDI signed the agreement. The terms of the contract included the following:

> All advertising copy is subject to approval of TDI and the Transportation Facility concerned [*i.e.*, the owner of the billboard] as to character, text, illustration, design and operation.
>
> If for any cause beyond its control TDI shall cease to have the right to continue the advertising covered by this contract, or if the Transportation Facility concerned should deem such advertising objectionable for any reason, TDI shall have the right to terminate the contract and discontinue the service without notice.

During the fall, Lebron worked on creation of his piece for the 10 × 103 foot space. On December 2, 1992, he provided TDI with a color photocopy of his piece. The work is a photomontage, accompanied by considerable text. Taking off on a widely circulated Coors beer advertisement which proclaims Coors to be the "Right Beer," Lebron's piece is captioned "Is it the Right's Beer Now?" It includes photographic images of convivial drinkers of Coors beer, juxtaposed with a Nicaraguan village scene in which peasants are menaced by a can of Coors that hurtles towards them, leaving behind a tail of

fire, as if it were a missile. The accompanying text, appearing on either end of the montage, criticizes the Coors family for its support of right-wing causes, particularly the contras in Nicaragua. Again taking off on Coors' advertising which uses the slogan of "Silver Bullet" for its beer cans, the text proclaims that Coors is "The Silver Bullet that aims The Far Right's political agenda at the heart of America."

On December 7, TDI sent the work on to Amtrak for approval. Ten days later, Anthony DeAngelo, the Amtrak Vice President for Real Estate and Operations Development, the person authorized by Amtrak's Board of Directors to oversee third-party advertising located on Amtrak property, disapproved Lebron's work on the grounds that it was "political." Amtrak notified TDI of this decision on December 23 in a letter stating that "Amtrak's policy is that it will not allow political advertising on the [S]pectacular advertising sign." Lebron learned of Amtrak's rejection from TDI on December 29, 1992, three days before his advertisement was to appear in the Spectacular.

Discussion

A. *Governmental Action*

Lebron contends that in rejecting his work Amtrak engaged in censorship in violation of his free speech rights under the First Amendment. Alternatively put, he contends that Amtrak's actions violated the requirements that the First Amendment imposes on governmental regulation of speech. The prohibitions of the First Amendment are "a restraint on government action, not that of private persons." *Columbia Broadcasting System, Inc. v. Democratic National Committee*, 412 U.S. 94, 114 (1973) (citing *Public Utilities Comm'n v. Pollak*, 343 U.S. 451 (1952)).

Amtrak claims it is a private entity, immune from the restrictions of the First Amendment and, to the contrary, guaranteed the right under the First Amendment to control speech on its billboards in whatever fashion it chooses. The first

issue in contention thus turns on whether Amtrak should be deemed a governmental or a private actor for these purposes.

"Conduct that is formally 'private' may become . . . so impregnated with a governmental character as to become subject to the constitutional limitations placed upon state action." *Evans v. Newton*, 382 U.S. 296, 299 (1966). The Supreme Court has outlined several ways through which the activities of a private entity can become governmental action. One such standard is relevant here.[2] Under this standard, known as the "symbiotic relationship" test, private activity becomes subject to the restrictions that the Constitution imposes on government when the government "has so far insinuated itself into a position of interdependence with [the private entity] that it must be recognized as a joint participant in the challenged activity." *Burton v. Wilmington Parking Auth.*, 365 U.S. 715, 725 (1961); *accord Evans v. Newton*, 382 U.S. at 299. There must be a " 'sufficiently close nexus between the State and the challenged action . . . so that the action of the [private actor] may be fairly treated as that of the State itself.' " *Blum v. Yaretsky*, 457 U.S. 991, 1004 (1982) (quoting *Jackson v. Metropolitan Edison Co.*, 419 U.S. 345, 351 (1974)). *See also Myron v. Consolidated Rail Corp.*, 752 F.2d 50, 54 (2d Cir. 1985) (same standards applied in assessing "federal action"

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[2] The other two standards are the "public function" doctrine, *Flagg Bros., Inc. v. Brooks*, 436 U.S. 149, 157 (1978), and the "state compulsion" doctrine, *Adickes v. S. H. Kress & Co.*, 398 U.S. 144 (1970). The latter is applicable when the government "has exercised coercive power or has provided . . . significant encouragement, either overt or covert," to bring about the challenged action. *Blum v. Yaretsky*, 457 U.S. 991, 1004 (1982). The former doctrine holds government action may be present "if the private entity has exercised powers that are 'traditionally the exclusive prerogative of the State.'" *Blum*, 457 U.S. at 1005 (quoting *Jackson v. Metropolitan Edison Co.*, 419 U.S. 345, 353 (1974)); *see also Flagg Bros., Inc. v. Brooks*, 436 U.S. 149, 160 (1978). It is not enough that the government has authorized a private entity to perform a task; it must be a role traditionally performed by the state. *See Flagg Bros.*, 436 U.S. at 160-62; *Jackson*, 419 U.S. at 352-53; *see also Marsh v. Alabama*, 326 U.S. 501 (1946) (company town with all the attributes of public town subject to constitutional limitations).

as for "state action") (citing cases). The symbiotic relationship test "focuses on the [government's] overall relationship with the private actor," *Hadges v. Yonkers Racing Corp.*, 918 F.2d 1079, 1082 (2d Cir. 1990), and "does not require that the plaintiff demonstrate that the state was involved in the challenged conduct." *Stevens v. New York Racing Ass'n, Inc.*, 665 F. Supp. 164, 171 (E.D.N.Y. 1987).

The Supreme Court has consistently emphasized that the issue of state, or governmental, action turns on a factual inquiry specific to each situation. "Only by sifting facts and weighing circumstances can the nonobvious involvement of the State in private conduct be attributed its true significance." *Burton v. Wilmington Parking Authority*, 365 U.S. at 722 (private restaurant, operated in space leased from city owned parking garage, that refused service to blacks, deemed governmental actor where revenues from discriminatory service ultimately financed the public parking facility); *see Skinner v. Railway Labor Executives Ass'n*, 489 U.S. 602, 614 (1989) ("Whether a private party should be deemed an agent or instrument of the Government for Fourth Amendment purposes necessarily turns on the degree of the Government's participation in the private party's activities, a question that can only be resolved 'in light of all the circumstances.' ") (citations omitted); *Lugar v. Edmondson Oil Co.*, 457 U.S. 922, 939 (1982) (determination "necessarily fact-bound"); *see also Rendell-Baker v. Kohn*, 457 U.S. 830, 838 (1982) (private remedial school held to be non-governmental, notwithstanding state regulation and funding, in a suit by discharged teachers).

I conclude, based on examination of the federal government's deep and controlling entwinement in Amtrak's structure and operations, that, when Amtrak undertakes to control the content of speech on its billboards, its conduct must be deemed governmental rather than private.

What is clear at a glance is that Amtrak does not comfortably fit the conventional mold of either private or governmental entity.

In form and name it resembles more closely a private entity. It is a for-profit business corporation and is decreed by act of Congress "not [to] be an agency, instrumentality, authority, or entity, or establishment of the United States Government." 45 U.S.C. § 541. Its common stock is owned by private railroad companies.

On the other hand, in both image and reality, it is impregnated with governmental character and inseparably intertwined with governmental authority and financing. Looking first at the symbolic, Congress established Amtrak, 45 U.S.C. § 501, and defined it as a "mixed-ownership government corporation." 31 U.S.C. § 9101. It is defined in the Americans with Disabilities Act, 42 U.S.C. § 12101, *et seq.*, as a "public entity."[3] 42 U.S.C. § 12131(1)(C).

More significant is the governmental penetration of Amtrak's operations. All of Amtrak's directors are appointed directly or indirectly by the President of the United States. 45 U.S.C. § 543. Of its nine board members, five are directly appointed by the President;[4] the sixth is the Secretary of Transportation sitting ex officio, who is also appointed directly by the President. Two board members are selected by the United States Government, as the owner of all of Amtrak's preferred stock. The final member of the board is the president of Amtrak, who is selected by the other directors. The parties agree that Amtrak's board is responsible for controlling Amtrak and would have the authority to approve or disapprove of Amtrak's advertising policies throughout its facilities. Indeed, the board has, by resolution, authorized Amtrak's current agreements with TDI concerning advertising.

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[3] Amtrak is also subject to the Freedom of Information Act. 45 U.S.C. § 546(g).

[4] One is selected from a list supplied by the Railway Labor Executives Association, one from among the governors of states with an interest in rail transportation, and one as a representative of business with an interest in rail transportation. 45 U.S.C. § 543(a)(1)(C). Two directors are selected from lists of names supplied by commuter authorities that work with Amtrak. § 543(a)(1)(D)(ii).

The federal government is also deeply involved in the financing of Amtrak's operations. Every year, Congress appropriates the sum necessary to cover the shortfall of Amtrak's operating results. *See* 45 U.S.C. § 601.[5] For example, for the fiscal year ending September 30, 1993, Congress has appropriated up to $846 million for Amtrak's operating losses, capital improvements, tax liability, and labor protection costs and for the Northeast Corridor Improvement Program. Pub. L. 102-388, 106 Stat. 1520 (Oct. 6, 1992). For this reason, Amtrak's revenues from the leasing of its billboard space are, in a sense, revenue of the federal government. Every dollar of net billboard revenue realized by Amtrak results in a one dollar reduction of the subsidy obligation of the federal government. Conversely, if Amtrak subsidized any exhibitor on its billboards by charging less than the market rate, the display would essentially be financed by the federal government.[6]

Amtrak has also been vested with various attributes of governmental character. For example, Congress has given Amtrak the power of eminent domain, 45 U.S.C. § 545(d), exemption

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[5] In fact, as the parties have agreed, in 1976, Amtrak's fiscal year end for accounting purposes was changed from December 31 to September 30 "to coincide with the fiscal year adopted by the federal government and used in providing federal assistance to [Amtrak]."

Congress stated as a goal that Amtrak use its "best business judgment in taking actions to minimize Federal subsidies." 45 U.S.C. § 501a(1), and Congress encouraged Amtrak to "enter into agreements with the private sector and undertake initiatives which are consistent with good business judgment and designed to maximize its revenues and minimize Federal subsidies." 45 U.S.C. § 501a(14).

[6] *See Burton*, 365 U.S. at 724 (discriminatory practices of restaurant allegedly increased business and therefore benefitted the restaurant's landlord, the government, supporting finding of state action); *Citizens to End Animal Suffering & Exploitation, Inc. v. Faneuil Hall Marketplace, Inc.*, 745 F. Supp. 65, 73 (D. Mass. 1990) (state action finding supported by fact that success of private entity served financial interests of city in reviving urban area); *Stevens v. New York Racing Ass'n, Inc.*, 665 F. Supp. at 172-75 (likelihood of state action where excess revenues of the non-profit association went to the state).

from state and local taxes and fees, including all real estate taxes, 45 U.S.C. § 546(b), and various loan guarantees, 45 U.S.C. § 602, so that it borrows under the credit of the federal government. Amtrak is required to report annually to Congress on its operations. 45 U.S.C. § 548.

Finally, the federal government has invested billions of dollars in Amtrak's properties. Amtrak acquired its Northeast Corridor properties, including Penn Station, by statutory condemnation paid for by the United States.[7] *See* Regional Rail Reorganization Act of 1973, 45 U.S.C. § 701 *et seq*. The federal government has also invested billions of dollars in the improvement of Amtrak's Northeast Corridor facilities. *See* 45 U.S.C. § 854 (authorzing up to $2.5 billion). While Amtrak owns the fee in Penn Station, the federal government holds a mortgage on it, and indeed on all the Northeast Corridor properties.[8]

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[7] After much litigation and negotiation, the federal government, in 1981, paid Penn Central $2.113 billion as compensation for the Northeast Corridor properties, including Penn Station.

[8] In addition, portions of Penn Station are used by other governmental entities under leases with Amtrak. For example, Amtrak leases significant portions of Penn Staion to the Long Island Rail Road (LIRR) and New Jersey Transit (NJT), both public entities, for the operation of their respective rail passenger services. An array of leases and joint agreements among Amtrak, LIRR, and NJT govern the management of public areas of Penn Station and the funding of construction and maintenance of various train and tunnel facilities. Hence, portions of the station occupied by LIRR and NJT are subject to constitutional limitations, and these areas are largely contiguous with those controlled by Amtrak. Indeed, some facilities of LIRR and NJT, such as ticket and information booths, are in the midst of Amtrak's facilities on the same floor of Penn Station as the Spectacular. Notably, the public therefore has little way of knowing whether or not it is in an area where constitutional limitations apply. *See Coleman v. Wagner College*, 429 F.2d 1120, 1127 (2d Cir. 1970) (Friendly, J., concurring (suggesting that one rationale for holding of *Burton* is that when "citizens may reasonably believe [action] to have been taken at the state's istance, state action may legitimately be found even though the state lef the private actors almost complete freedom of choice").

Thus, when Amtrak undertakes to control the content of the messages on its billboards in Penn Station, these controls are exercised by a corporation whose directors are appointed by the President, whose operations are financed by the federal government, and whose properties, in major part, are mortgaged to the federal government.

Amtrak contends that it cannot be deemed a governmental actor. It first cites a range of cases which found in various contexts that Amtrak is not a government agency or entity. *See, e.g., National R.R. Passenger Corp. v. Atchison, T. & S.F. Ry. Co.*, 470 U.S. 451, 454 (1985); *National R.R. Passenger Corp. v. Two Parcels of Land*, 822 F.2d 1261, 1264 (2d Cir.), *cert. denied*, 484 U.S. 954 (1987); *Ehm v. National R.R. Passenger Corp.*, 732 F.2d 1250, 1253-56 (5th Cir.), *cert. denied*, 469 U.S. 982 (1984); *Kimbrough v. National R.R. Passenger Corp.*, 549 F. Supp. 169, 173 (M.D. Ala. 1982); *Sentner v. Amtrak*, 540 F. Supp. 557 (D.N.J. 1982). These cases do not determine the question in this case. Plaintiff does not contend that Amtrak is a governmental agency. What plaintiff contends is that the federal government is sufficiently entwined in Amtrak's operations and authority that the particular actions at issue must be deemed governmental action.

Next Amtrak relies on a number of cases in which discharged employees charged either Amtrak or the similarly structured Consolidated Rail Corporation ("Conrail") with unconstitutional governmental action. In each of these cases, the courts held that Amtrak's (or Conrail's) actions in dealing with its employees were not deemed to be governmental action. *See, e.g., Myron v. Consolidated Rail Corp.*, 752 F.2d 50 (2d Cir. 1985) (constitutional limitations do not apply to the activities of Conrail in discharging an individual employee); *Anderson v. National R.R. Passenger Corp.*, 754 F.2d 202, 204 (7th Cir. 1984) (in challenge to employee termination, Amtrak not a state actor); *Andrews v. Consolidated Rail Corp.*, 831 F.2d 678 (7th Cir. 1987) (Conrail not state actor in refusing to reinstate employee); *Morin v. Consolidated Rail Corp.*, 810 F.2d 720 (7th Cir. 1987) (no state

action in discharging employee); *Marcucci v. National R.R. Passenger Corp.*, 589 F. Supp. 725 (N.D. Ill. 1984) (no state action in wrongful discharge suit); *Rost v. National R.R. Passenger Corp.*, 1989 WL 104809 (E.D. Pa. Sept. 11, 1989) ("no allegations concerning the nexus between the federal government and Amtrak's personnel practices."); *Hankin v. National R.R. Passenger Corp.*, 1987 U.S. Dist. LEXIS 10741 (N.D. Ill. Nov. 16, 1987) (following *Anderson*); *cf. Railway Labor Executives Ass'n v. National R.R. Passenger Corp.*, 691 F. Supp. 1516, 1524 n.11 (D.D.C. 1988) (drug testing by Amtrak not Fourth Amendment violation). Amtrak argues that these authorities conclusively determine for the present litigation that it is not a governmental actor.

The argument is unpersuasive. The fact that Amtrak is considered a private employer in administering its employment of personnel does not mean it will be deemed private when it regulates speech. Whether conduct of a particular entity will be deemed governmental action can vary with the type of action at issue.[9] As Judge Friendly explained in *Wahba v. New York University*, 492 F.2d 96, 100 (2d Cir. 1974), "we do not find decisions dealing with one form of state involvement and a particular provision of the Bill of Rights at all determinative in passing upon claims concerning different forms of government involvement and other constitutional guarantees." *See also Weise v. Syracuse University*, 522 F.2d 397, 404 (2d Cir. 1975). Indeed Amtrak conceded at oral argument that, if it restricted service to passengers on the basis of race, religion, or national origin, it would be deemed a governmental actor in that respect. *See Burton v. Wilmington Parking Authority, supra.*

In my view, the regulation of public speech through the use of the billboards in public train stations raises very different

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[9] Indeed, several courts have concluded that Amtrak can be a state actor in the context of false arrest claims brought against Amtrak security officers. *See, e.g., Merola v. National R.R. Passenger Corp.*, 683 F. Supp. 935, 940-41 (S.D.N.Y. 1988); *Sisak v. National Railroad Passenger Corp.*, 1992 WL 42245 (S.D.N.Y. February 24, 1992).

considerations from Amtrak's administration of its work force.

In actions based on an employer's dealings with employees, no particularly great significance attaches to whether the employer's actions are deemed to be private or governmental. There are no important policies of the Constitution that would be undermined by permitting an employer that is entwined with government to deal with employees under the rules that govern private employers. On the other hand, where the conduct in question is the regulation of speech, enormous differences follow from whether the actor is deemed to act as government or as a private individual. And to allow an entity controlled by and intertwined with the government to regulate, control, or censor speech in the manner that is permitted for a private actor risks to do enormous damage to one of the most important principles of the Bill of Rights.

If Amtrak is deemed a private actor for this purpose, it would enjoy the full range of the private citizen's rights of free speech under the First Amendment. It would be free to exercise discriminatory control over the messages transmitted by its billboards. For example, as the Presidential election approached, Amtrak would have the absolute right to devote all of its billboards to champion the reelection of the incumbent president and warn of danger to the republic if the challenger should be elected. Amtrak would enjoy this right, just like the owner of a private bar or bowling alley who has the undeniable right to cover the walls, if he chooses, with posters advocating the reelection of the president. Similarly, Amtrak would be free to sponsor advertisements on its billboards either opposing abortion or favoring choice; it could likewise advocate adherence to Catholicism and deprecate Protestantism, or vice versa, as it chose.

If, on the other hand, Amtrak's billboard regulation is deemed governmental, Amtrak would be barred from favoring a political candidate, from favoring messages of any chosen viewpoint, from sponsoring messages that established religion, from exercising arbitrary discrimination in allowing access to its billboards, and from regulating the speech of its

billboard tenants in any way, except within narrow parameters.

Among the most powerful principles asserted by our Constitution are those found in the First Amendment designed to prevent Government from exercising discretionary control over the content of the speech of private persons and entities. "Regulations which permit the Government to discriminate on the basis of the content of the message cannot be tolerated under the First Amendment," *Regan v. Time, Inc.*, 468 U.S. 641, 648-49 (1984) (citations omitted), for "the Government's ability to impose content-based burdens on speech raises the spector that the Government may effectively drive certain ideas or viewpoints from the marketplace." *Simon & Schuster, Inc. v. Members of New York State Crime Victims Bd.*, 112 S.Ct. 501, 508 (1991) (citation omitted).

Given the force of this principle, it is inconceivable that Amtrak, whose directors are appointed by the President, whose operations are financed by the Government, and which is subject to Governmental control and intertwinement in all the respects outlined above, would be free under the First Amendment to donate its billboards to the support of the incumbent President's reelection campaign. But that is the inevitable consequence if Amtrak is correct in its contention that it is engaged in private action when it controls the content of ads on its billboards.

One might argue that the conclusion should be otherwise when control is exercised not by the Presidentially-appointed directors, but by a lower level employee. But the argument is not persuasive. Regardless to what degree the board of directors exercises its control, it has the power to control the actions of the corporation it governs. Furthermore, the controls here at issue were exercised by a high officer, the director of Amtrak's real estate operations, to whom the Amtrak board had directly delegated such authority.[10]

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[10] Indeed, the minutes of meetings of Amtrak's board of directors show that the board has, on at least one occasion, authorized an individual lease for the Spectacular.

I conclude that, notwithstanding Amtrak's private character in its employment contracts, it must be deemed to engage in governmental action when it undertakes to regulate the content of the advertisements on its billboards.

B. *The Requirements of the First Amendment*

I now turn to the question whether Amtrak's actions comport with the requirements that the First Amendment places on such governmental conduct.

Along with other constraints, the First Amendment requires that, when the government regulates speech, it must do so by a policy that is (i) clearly set forth, (ii) not so vague as to be subject to abuse, (iii) consistently applied and (iv) not based on viewpoint. These rules are intended to avoid the risk that government may impose arbitrary, discriminatory, or preferential controls on speech. *See generally City of Lakewood v. Plain Dealer Publishing Co.*, 486 U.S. 750, 757-764 (1988) (invalidating ordinance giving town mayor complete discretion in licensing sidewalk newsracks). Without explicit standards, clearly disclosed, government regulation of speech may be applied in an arbitrary and discriminatory manner. *See Grayned v. City of Rockford*, 408 U.S. 104, 108-09 (1972); *Cramp v. Board of Public Instruction*, 368 U.S. 278, 286-87 (1961) (terms of regulation must be "susceptible of objective measurement"). The Supreme Court has cautioned that a scheme for regulating speech "that places 'unbridled discretion in the hands of a government official or agency constitutes a prior restraint and may result in censorship.' " *FW/PBS, Inc. v. City of Dallas*, 493 U.S. 215, 225 (1990) (quoting *Lakewood*, 486 U.S. at 757). "Precision of regulation must be the touchstone in an area so closely touching our most precious freedoms." *NAACP v. Button*, 371 U.S. 415, 438 (1963). In addition, a government restriction may not discriminate against speech on the basis of the viewpoint of the speaker. *See Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 45-46 (1983) (regulation of public forum must be content-neutral; regulation of non-public forum must

be viewpoint-neutral); *see also United States v. Kokinda*, 497 U.S. 720, 729 (1990); *Longo v. United States Postal Service*, 953 F.2d 790, 796 (2d Cir.) ("[r]estrictions on expression because of disagreement with message or idea being conveyed by the speaker" violate First Amendment), *vacated and remanded on other grounds*, ___ U.S. ___, 113 S. Ct. 31 (1992), *reinstated*, 983 F.2d 91 (2d Cir. 1992); *see generally International Society for Krishna Consciousness v. Lee*, 1992, ___ U.S. ___, 112 S. Ct. 2701 (1992).

I find that Amtrak's policy violates the first three (and possibly also the fourth) of these requirements.

(i) *Not clearly set forth.* The Amtrak policy identified by Mr. DeAngelo as the reason for the rejection is its prohibition of "political" advertisements in Penn Station. Nowhere is this policy committed to writing. Nor was the existence of the policy disseminated. Thus TDI, which leased out nearly all the billboards in Penn Station without consulting Amtrak, was unaware of the policy's existence. An unwritten censorship policy is susceptible to inconsistent application that threatens free speech. *See Lakewood*, 486 U.S. at 757; *see also Abel v. Town of Orangetown*, 759 F. Supp. 161, 164-65 (S.D.N.Y. 1991) (invalidating zoning ordinance allowing town board unfettered discretion in granting consent to place sign on town property); *New Alliance Party v. Dinkins*, 743 F. Supp. 1055, 1064-65 (S.D.N.Y. 1990) (special events permitting system of parks violated First Amendment where permits granted or refused without any regulatory guidelines).

In attempting to identify a writing that contains its policy, Amtrak points to two earlier advertising licensing agreements between Amtrak (or its predecessor, the Pennsylvania Railroad Company) and TDI. These agreements, dated 1967 and 1980, governed TDI's leasing of the Spectacular. Both agreements contained a provision stating that Amtrak could refuse any advertising that Amtrak, "in its judgment," may deem "unlawful, immoral, improper or offensive to good taste . . . or involve political or other views which could result in dis-

sension or involve [Amtrak] in dissension, complaints or controversy with its patrons or the public . . . ."

However, neither of these licensing agreements is still in effect. The 1980 agreement, which superseded the 1967 agreement, was itself superseded by another agreement in 1985 covering all Amtrak billboards in Penn Station. The 1985 agreement and its successor, the 1991 agreement, do not include any provision comparable to the one in the 1967 and 1980 agreements. They do state that, "All advertising material, exhibit material, notices and advertisements, and their manner of presentation and design, shall be subject to approval by Amtrak, which may disapprove any such items at its own discretion." This broad provision clearly does not state, or even imply, the rejection of all "political" advertising.

Moreover, the evidence makes clear that Amtrak's supposed policy rejecting "political" advertising was not even known to many of those responsible for billboard advertising. William P. Delaney, a project manager in Amtrak's Real Estate Department who is responsible for supervising Amtrak's arrangements with TDI for advertising in Amtrak's facilities, knew of no prohibition on "political" advertising applicable to any of Amtrak's facilities. None of the executives at TDI, who had been leasing Penn Station billboard space for years and who had authority to approve advertising copy for all areas other than the Spectacular, knew of Amtrak's policy barring "political" advertisements.

(ii) *Vague*. Even if Amtrak's policy, as expressed by Mr. DeAngelo, were in writing, or otherwise clearly set forth, such a policy would still be constitutionally infirm, for the term "political" is of such unclear meaning that it is easily susceptible to arbitrary or discriminatory censorship by those administering the policy. *See Bullfrog Films, Inc. v. Wick*, 847 F.2d 502, 513-14 (9th Cir. 1988) (invalidating as vague regulations that barred issuing educational certificates to documentary films that attempted "to influence opinion, conviction or policy (religious, economic, or political propa-

ganda), to espouse a cause, or conversely, when they seem to attack a particular persuasion" and that "appear to have as their purpose or effect to attach or discredit economic, religious, or political views or practices"); *see also Coates v. Cincinnati*, 402 U.S. 611, 614 (1971) ("conduct . . . annoying to persons passing by" unconstitutionally vague); *Gay Men's Health Crisis v. Sullivan*, 792 F. Supp. 278, 293-96 (S.D.N.Y. 1992) ("offensive to a majority of adults" unconstitutionally vague).

The policy might be thought, for example, to bar only advertisements relative to candidates for political office. It might be thought to encompass public service messages on public issues, including drunk driving, safe sex, abortion counselling, and religious messages. It might also cover commercial advertising that included public service messages like "Keep America Beautiful," or that discussed controversial issues.

Amtrak's executives were themselves at odds over the meaning of Amtrak's policy. Mr. DeAngelo at times indicated that the policy prohibited only those advertisements that were both "political" *and* divisive or objectionable; at other times, he stated that the policy prohibited all advertisements that were not devoted to the selling of a product or service. Bruce M. Bourque, Amtrak's Project Director for Real Estate Development for Penn Station, who first reviews advertising material submitted for the Spectacular, knew that there was a policy barring "political" advertisements, but he could not really say what such a policy meant. *See U.S. Southwest Africa/Namibia Trade & Cultural Council v. United States*, 708 F.2d 760, 769 (D.C. Cir. 1983) ("the hazy line between ideological and commercial speech is reflected in the record of this case").

This is not to say that reasonable individuals could never agree that a particular advertisement was or was not "political." As the court explained in *U.S. Southwest Africa/ Namibia Trade & Cultural Council v. United States*, 708 F.2d at 769,

> The point is not that the distinction between commercial and political speech is entirely unworkable—there is little doubt that it can operate successfully at the extremes to screen out patently political from wholly commercial advertisements. Rather, the point is that there is a gray area near the middle in which this particular subject matter restriction tends to operate as a *sub rosa* penalty on presenting political viewpoints in "controversial," as opposed to more benign "commercial," forms.

This again reflects the manner in which Amtrak's policy is susceptible to abuse, for "[a]pplying this guideline involves an exercise of discretion and subjective judgment on the part of [Amtrak] officials." *Lebron v. Washington Metropolitan Area Transit Authority*, 749 F.2d 893, 899 (D.C. Cir. 1984). In such circumstances, the threat is great that "the policy operates in part to screen out only controversial, but not non-controversial, political messages." *U.S. Southwest Africa/ Namibia Trade & Cultural Council*, 708 F.2d at 769.

Amtrak contends that the term "political" as employed in its policy means to include (and therefore prohibit) all advertisements that do not seek to sell a product or service. However, that is certainly not what the term "political" is generally understood to mean, and, as noted, this is not how the relevant personnel understand the policy. When a standard for governmental control of speech is so unclear, there is a high likelihood of inconsistent and discriminatory application. Such a vague policy provides Amtrak officials with precisely the kind of unfettered discretion to control speech that the Supreme Court has held to contravene the First Amendment. *See, e.g., FW/PBS, Inc.*, 493 U.S. at 226; *Lakewood*, 486 U.S. at 757; *Shuttlesworth v. Birmingham*, 394 U.S. 147, 151 (1969); *Saia v. New York*, 334 U.S. 558, 560 (1948) ("There are no standards prescribed for the exercise of [the official's] discretion."); *see generally Staub v. City of Baxley*, 355 U.S. 313, 322 (1958) ("It is settled by a long line of recent decisions of this Court that an ordinance which . . . makes the

peaceful enjoyment of freedoms with the Constitution guarantees contingent upon the uncontrolled will of an official—as by requiring a permit or license which may be granted or withheld in the discretion of such official—is an unconstitutional censorship or prior restraint upon the enjoyment of those freedoms.").

(iii) *Not consistently applied.* A further infirmity in Amtrak's "no political advertisements" policy is that it is not consistently applied. As noted above, the policy is unknown to Amtrak's leasing agent, with the result that billboard space in Penn Station has repeatedly been leased for advertisements that are "political" in the sense of Amtrak's definition. Indeed, the licensing agreement between Amtrak and TDI expressly allows for public service advertisements (at reduced rates or no charge). And TDI maintains written *Guidelines For Public Service Advertising*. They provide that such advertising will be displayed (at less than full rate) for no more than a thirty-day period, only when space is available and may be pre-empted by any commercial (*i.e.*, full rate) advertising. The guidelines are designed to insure that such noncommercial advertisements shall be accepted only from "recognized, legitimate [tax exempt] not-for-profit organizations, corporations, National, State or Local government agencies and subdivisions, philanthropic or cultural organizations whose activities would be of interest or benefit to a majority of the area population," and that the advertisements adhere to "good taste, decency and community standards." It is clear that all of the advertisements covered by the Guidelines for Public Service Advertising are of the type that Amtrak contends are prohibited by its rule.

Furthermore, TDI's leasing guidelines do recognize a distinction affecting advertisements that are "political." The TDI guideline, however, does not reject them, but rather considers them commercial and therefore subject to full rate charge.[11]

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[11] Particularly baffling in the context of this case is the TDI guideline that states:

(footnote continued)

It is clear beyond dispute that Amtrak's policy is not being consistently followed. TDI's records show that it leases space to advertisers that are not "commercial," and some of which are arguably "political." These include the New York Department of the Environment, the New York Department of Commerce, a foundation for muscular dystrophy, and *Plain Truth* magazine, a free magazine on political and social issues published by The Worldwide Church of God. In addition, testimony of the general counsel of TDI indicates that TDI regularly displays public service advertisements, including subjects such as the homeless, the environment, drunk driving, AIDS awareness, health issues, and race relations.[12]

(iv) *Void for viewpoint bias.* Furthermore, depending on which of the many proffered versions really is Amtrak's policy, the policy may also be void because of discrimination based on viewpoint. *See Perry Educ. Ass'n*, 460 U.S. at 45-46.

If, for example, Amtrak's policy, as Mr. DeAngelo sometimes testified, is directed against divisive, controversial, or objectionable matter, or if, as set forth in the 1967 and 1980 agreements with TDI, it gives Amtrak discretion to refuse any advertising involving "views which could result in dissension or involve [Amtrak] in dissension, complaints or controversy with its patrons or the public . . . ," it would be void; gov-

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> Because of the separation of Church and State dictates of our Constitution, organizations that are primarily religious in structure *do not* qualify for Public Service space.

(Emphasis in original).

[12] Amtrak contends that its policy has been consistently applied with respect to the Spectacular, as it has never had a political advertisement in that space. Amtrak does not contend, however, that its policy against political advertisements applies only to the Spectacular. But even if it did, the policy would nonetheless be void for the first two reasons discussed: that it is not written or clearly disseminated and that it is too vague to be consistently applied (and also perhaps for the fourth reason discussed, that it is viewpoint-based censorship, depending on the meaning of Amtrak's policy).

ernment may not regulate speech by such criteria. *Texas v. Johnson*, 491 U.S. 397, 414 (1989). "[T]he use of the controversial nature of speech as the effective touchstone for regulation 'threatens a value at the very core of the First Amendment, the "profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open." ' " *U.S. Southwest Africa/Namibia Trade & Cultural Council*, 708 F.2d at 769 (quoting *Consolidated Edison Co. v. Public Service Commission*, 447 U.S. 530, 548 n.9 (1980) (Stevens, J., concurring) (quoting *New York Times v. Sullivan*, 376 U.S. 254, 270 (1964))). An advertisement such as Lebron's

> cannot be prohibited . . . merely because it provokes disagreements and offends the sensibilities of the majority. "Speech is often provocative and challenging. It may strike at prejudices and preconceptions and have profound unsettling effects as it presses for acceptance of an idea." It is precisely this speech for which the protection of the First Amendment was intended.

Penthouse International, Ltd. v. Koch, 599 F. Supp. 1338, 1350 (S.D.N.Y. 1984) (citation omitted); *see also Terminiello v. City of Chicago*, 337 U.S. 1, 4 (1949) ("A function of free speech under our system of government is to invite dispute."); *United States v. Schwimmer*, 279 U.S. 644, 654-55 (1929) (Holmes, J., dissenting) ("not free thought for those who agree with us but freedom for the thought that we hate").

If the policy is as set forth in TDI's guidelines, whether for Public Service Advertising or for Commercial Advertising, it is void for the same reason, for these guidelines are designed to ensure against advertising that is controversial, in bad taste, or inconsistent with the taste and preferences of the majority of the community. Such standards are of course permissible for a private actor, but not for a governmental actor or an actor whose symbiotic relationship with government renders the act of regulation governmental. Because Amtrak is saturated with the presence of the federal government, it may not

regulate speech in an effort to shield its customers from the abrasive, the obnoxious, the controversial.

Conclusion

Plaintiff Lebron has convincingly demonstrated that in rejecting his contract to display his art on its billboard Amtrak was engaged in governmental action and that the standards employed by Amtrak in rejecting his work violated its obligations under the First Amendment.[13]

Defendants are accordingly directed to give plaintiff immediate access to the Spectacular in accordance with his contract.

Dated: New York, N.Y.
February 5, 1993

SO ORDERED:

Pierre N. Leval, U.S.D.J.

[13] I do not reach Lebron's alternative contract theory because this resolution makes it superfluous.

APPENDIX D

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

Docket No. 93-7127

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse, Foley Square, in the City of New York, on the thirtieth day of October, one thousand nine hundred ninety-five.

Present: HON. JON O. NEWMAN, Chief Judge
HON. J. EDWARD LUMBARD, Circuit Judge
HON. J. DANIEL MAHONEY, Circuit Judge

Docket No. 93-7127

MICHAEL A. LEBRON,

Plaintiff-Counter-Defendant-Appellee,

—v.—

NATIONAL RAILROAD PASSENGER CORPORATION (Amtrak),

Defendant-Appellant,

TRANSPORTATION DISPLAYS INCORPORATED,

Defendant-Counter-Claimant.

The action herein having been taken to the Supreme Court of the United States by writ of certiorari, and said Court hav-

ing reversed the judgment of this Court and remanded the action for further consideration in conformity with the opinion of the Supreme Court of the United States.

UPON CONSIDERATION THEREOF, IT IS ORDERED that the judgment of the District Court be, and it hereby is, reversed; and IT IS FURTHER ORDERED that this matter be, and it hereby is, remanded to the District Court for further action in accordance with the opinion of this Court.

FOR THE COURT:
GEORGE LANGE III, Clerk

By: _____
Beth J. Meador
Administrator Attorney

(2)

Supreme Court, U.S.
FILED
APR 11 1996
CLERK

No. 95-1373

IN THE
Supreme Court of the United States
OCTOBER TERM, 1995

MICHAEL A. LEBRON,
Petitioner,
v.
THE NATIONAL RAILROAD PASSENGER CORPORATION (AMTRAK),
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

BRIEF IN OPPOSITION

KEVIN T. BAINE *
STEVEN M. FARINA
WILLIAMS & CONNOLLY
725 Twelfth Street, N.W.
Washington, D.C. 20005
(202) 434-5000
Counsel for Respondent National Railroad Passenger Corporation

Of Counsel:
DANIELA WINKLER
RICHARD G. SLATTERY
NATIONAL RAILROAD PASSENGER CORP.
60 Massachusetts Avenue, N.E.
Washington, D.C. 20002

* Counsel of Record

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

32 pp

QUESTION PRESENTED

Whether the First Amendment requires that Amtrak depart from its longstanding policy of limiting an enormous illuminated billboard in Pennsylvania Station to commercial advertising and permit the display of petitioner's political attack ad.

RULE 29.1 LISTING

The National Railroad Passenger Corporation has no parent companies or subsidiaries.

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THE NATIONAL RAILROAD PASSENGER CORPORATION (AMTRAK),

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

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BRIEF IN OPPOSITION

STATEMENT OF THE CASE

The petitioner in this case seeks to compel the National Railroad Passenger Corporation ("Amtrak") to make available the massive "Spectacular" billboard that dominates the entrance to Pennsylvania Station in New York for the display of an advertisement attacking the political activities of the Coors family, owners of the Coors Brewing Company. Amtrak re-

jected petitioner's political advertisement pursuant to the corporation's longstanding policy of limiting the Spectacular to commercial advertising. Petitioner has alleged that, regardless of any policy, the contract he signed required Amtrak to display his political advertisement. Petitioner also has alleged that Amtrak's policy of excluding political advertising from the Spectacular violates the First Amendment.

The district court deemed resolution of petitioner's contract claim "superfluous," because it instead found that the First Amendment compelled Amtrak to display petitioner's political attack ad. App. 22c n.13.[1] The court of appeals reversed. Applying this Court's "public forum" doctrine, the panel concluded that Amtrak's refusal to accept political advertising on the Spectacular was reasonable and viewpoint-neutral, and that petitioner therefore had no First Amendment right to display his advertisement on the Spectacular. App. 4a. The court of appeals ordered that petitioner's constitutional claim be dismissed, and remanded the case for consideration of his contract claim. App. 3b.

The petition should be denied for two reasons. First, the case is not ripe for review, because petitioner's contract claim remains to be decided by the courts below. Second, the decision below does not warrant review on the merits, because it was based on well-established principles of public forum law and a decision of this Court, *Lehman v. City of Shaker Heights*, 418 U.S. 298 (1974), that is indistinguishable on the facts.

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[1] Citations to App. —— are to the pages of the appendix to the Petition. Citations to C.A.App. —— and E —— are to pages of the joint appendix and exhibit volumes in the court of appeals.

A. Background

1. *The Spectacular*

On the west side of the upper level of Penn Station, dominating the main entrance to Amtrak's waiting room and ticket area, is a curved, 103-foot long by 10-foot high illuminated billboard known as "the Spectacular." App. 4a. As anyone who has been in Penn Station can attest, it is virtually impossible not to notice the Spectacular as one enters the Amtrak terminal and descends on the escalators that directly face it. C.A.App. 1177. In the words of the district court, its presence is "inescapable." C.A.App. 139.

The Spectacular was constructed in 1967 by Transportation Displays, Incorporated ("TDI"), a privately-held advertising agency, pursuant to a contract with the Pennsylvania Railroad Company, which then owned Penn Station. The contract gave TDI the right to "construct and maintain, at [its] own cost and expense, an advertising Spectacular display for sale to advertisers." E 188. TDI agreed to pay the railroad a percentage of the gross receipts derived from advertising displayed on the Spectacular, and it agreed further that no advertisement would be displayed without prior approval of the railroad. E 190, 192.

Amtrak, which now owns Penn Station and exercises complete control over the area where the Spectacular is located, has continued essentially the same arrangement that the Pennsylvania Railroad Company had with TDI. The contract now in effect between Amtrak and TDI authorizes TDI to sell advertising space on the Spectacular and in other locations, and provides that TDI shall pay Amtrak a percentage of its net receipts. E 3. It also expressly provides

that "[a]ll advertising material, exhibit material, notices and advertisements and their manner of presentation and design, shall be subject to approval by Amtrak." E 5.

Advertising on the Spectacular (which sells for nearly $20,000 per month) at all relevant times was overseen by Amtrak's Real Estate and Operations Development Department. E 2345. The Vice President for that Department, Anthony DeAngelo, applied Amtrak's advertising policies and made the final decision whether to approve ads for the Spectacular. C.A.App. 106-08.

Political advertising has *always* been prohibited on the Spectacular. C.A.App. 107, 365-66, 813-15, 823-24, 844. In fact, the Pennsylvania Railroad Company adopted this policy in 1967 when the Spectacular was first built—years before Amtrak even existed. C.A.App. 365-66, 813-15; E 192. Amtrak continued the policy when it assumed control over the Spectacular in 1976 because, like the Pennsylvania Railroad, it recognized that partisan displays might offend or anger some of its customers. In the nearly three decades since its construction, no remotely political or other noncommercial advertisement has ever appeared on the Spectacular.[2] As Chief Judge Newman noted in dissent below, "Amtrak's billboard space in Pennsylvania Station . . . has not become a forum for ads of such pointed political content as Lebron's attack on the makers of Coors beer for pro-

[2] The only ads that have appeared on the Spectacular are those promoting the DuPont Company, Resorts International in Atlantic City, the Broadway play "Sophisticated Ladies," Fujitsu computers, Nike athletic wear, and A&S Department Store. App. 7a.

moting 'The Far Right's political agenda.' " 12 F.3d at 394.

2. *Amtrak's Rejection of Petitioner's "Advertorial"*

Petitioner's proposed "advertorial," as he calls it, is a photomontage of convivial Coors beer drinkers, juxtaposed with a scene in which Nicaraguan villagers are menaced by a flaming Coors beer can hurtling toward them like a missile. In addition to its powerful visual image, the advertorial contains considerable text, superimposed on an American flag, which is sharply critical of the Coors family's support of "The Far Right's political agenda." App. 5a.[3] Although he now contends that the "subject matter" of his advertorial is "whether to buy Coors Beer," Pet. 15, petitioner previously described the display as "an allegory about the destructive influence of a powerful, urban, materialistic and individualistic culture on rural, community based, family-oriented and religious cultures," App. 4a-5a.

On November 30, 1992, petitioner signed a contract with TDI to display his work for two months on the Spectacular. App. 4a. Petitioner knew when he signed the TDI contract that Amtrak retained the right to reject his ad. App. 4a. And he anticipated that there might be objection to the display of his advertorial on the Spectacular because of its "unusual nature." As he conceded, "[i]t wasn't commercial in the way they are used to." C.A.App. 228. In fact, "because of the subject matter" of his work, petitioner deliberately avoided disclosing its content to TDI until December 2, 1992, two days after he signed the TDI contract. C.A.App. 201-03, 211.

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[3] The full text of petitioner's advertorial is reprinted in the Appendix to this Brief in Opposition.

On December 17, Amtrak's Vice President, Anthony DeAngelo, first learned of petitioner's proposed ad. He immediately rejected it as political. C.A.App. 107-08. In a letter dated December 23, 1992, DeAngelo notified TDI of his decision, invoking Amtrak's longstanding "policy that it will not allow political advertising on the spectacular advertising sign." App. 5a; C.A.App. 114.[4]

TDI offered petitioner any one of 500 alternative sites in New York City, all of which he rejected. App. 5a. As petitioner explained, he considers the Spectacular "an extraordinarily unique advertising location in New York City." App. 6a.

B. The Decisions Below

Petitioner commenced this action on December 30, 1992, seeking an injunction requiring Amtrak to display his advertorial. Petitioner advanced two claims: (1) that Amtrak's refusal to display his advertorial breached certain contractual obligations owed him under the lease he signed, entitling him to specific performance; and (2) that the First Amendment required Amtrak to provide him access to the Spectacular for display of his political ad. C.A.App. 84-95.

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[4] Petitioner contends that Amtrak's policy is "unwritten" and "undisseminated." Pet. 19. But when petitioner last briefed the case to this Court, he acknowledged that "[t]he advertising policy at issue here preceded DeAngelo's arrival at Amtrak . . . and is reflected in writing in Amtrak's leasing contracts." Brief for Petitioner (No. 93-1525), at 13. And although the policy may not have been widely disseminated to all Amtrak employees, what matters is that Anthony DeAngelo —the person responsible for overseeing third party advertising on the Spectacular and who rejected petitioner's ad—knew of and understood Amtrak's policy.

The district court conducted a trial entirely on documentary submissions—including deposition transcripts, exhibits, stipulations, and admissions derived from each party's "mark-up" of proposed findings of fact submitted by the opposition.

On February 5, 1993, the district court issued an opinion and order directing Amtrak to give petitioner immediate access to the Spectacular. The court held that Amtrak's decision to refuse to display petitioner's political advertorial on the Spectacular violated the First Amendment. App. 14c-22c. In reaching this conclusion, the district court ignored this Court's well-established public forum doctrine, which permits the government, when acting as proprietor rather than lawmaker, to control access to its property "based on subject matter and speaker identity so long as the distinctions drawn are reasonable in light of the purpose served by the forum and are viewpoint neutral." *Lamb's Chapel v. Center Moriches Union Free School District*, 113 S. Ct. 2141, 2147 (1993) (quotation omitted). The district court failed to define the forum at issue, failed to determine whether the Spectacular (or whatever else the court thought the forum to be) was a public or nonpublic forum, and failed even to mention—let alone distinguish—*Lehman v. City of Shaker Heights*, 418 U.S. 298 (1974), a decision of this Court expressly upholding a municipal government's policy of prohibiting political advertising on city buses. The district court justified its holding that Amtrak must grant petitioner access to the Spectacular by applying *strict scrutiny*, in reliance on cases involving *public fora* open to all expressive activity. App. 14c-21c. The court did not reach petitioner's "alternative contract theory," explaining that "this resolution makes it superfluous." App. 22c n.13.

On October 30, 1995, in an opinion written by Judge Mahoney and joined by Judge Lumbard, the court of appeals reversed, holding that petitioner had no First Amendment right to display his advertorial on the Spectacular. App. 4a.[5] Unlike the district court, the court of appeals applied public forum doctrine. Relying on this Court's decision in *Cornelius v. NAACP Legal Defense & Education Fund, Inc.*, 473 U.S. 788 (1985), the panel first determined that the relevant forum for purposes of analysis was the Spectacular, because petitioner sought access only to this unique property. App. 9a-10a. Next, the court of appeals looked to Amtrak's "policy and practice" to determine whether Amtrak "intended to designate" the Spectacular as a forum for political advertising. App. 10a (citing *Cornelius*, 473 U.S. at 802). The panel found that Amtrak's "practice is clear; it has never opened the Spectacular for anything except purely commercial advertising." App. 10a. The court concluded that "[i]n light of Amtrak's undisputed practice . . . the Spectacular is not a public forum." App. 11a.

Having determined that Amtrak had not intentionally designated the Spectacular an open forum for political speech, the panel turned to the question whether Amtrak's decision met the requisites established by this Court for regulating access to a non-

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[5] The court of appeals initially held, on December 27, 1993, that Amtrak was not a governmental actor for constitutional purposes. 12 F.3d 388 (2d Cir. 1993). Last year, this Court reversed that decision, holding that Amtrak is bound by the First Amendment. 115 S. Ct. 961 (1995). The Court remanded the case for a determination whether Amtrak's refusal to display petitioner's advertorial violated the First Amendment—a question upon which this Court "express[ed] no opinion." *Id.* at 975.

public forum. Relying on this Court's decision in *Lehman v. City of Shaker Heights*, *supra*, which upheld a policy virtually identical to Amtrak's exclusion of political advertising from the Spectacular, the panel found Amtrak's policy to be both reasonable and viewpoint-neutral. App. 11a-16a. Accordingly, the court of appeals reversed the judgment and remanded the case with the instruction that the district court dismiss petitioner's complaint, leaving petitioner "free to pursue his state law claim in state court." App. 18a.

On December 29, 1995, the court of appeals amended its earlier decision in two respects. First, the panel corrected a factual error in the opinion. The court had written that Amtrak's prohibition against political advertising "was limited in scope to the Spectacular." App. 16a. Although Amtrak applies the policy differently to the Spectacular (conducting prior review and approval of all proposed advertisements), Amtrak prohibits political advertising on all of its property. C.A.App. 349-52. The court of appeals amended its opinion to reflect this fact, but that amendment had no impact on the court of appeals' analysis—whether or not Amtrak has opened a forum for political advertising elsewhere is irrelevant to whether petitioner may display his advertorial on the Spectacular. App. 3b.

Second, the panel amended its disposition of petitioner's contract claim. Instead of leaving that claim for a state court to resolve, the panel instructed the district court on remand to rule on petitioner's contract claim. The court reasoned that "[b]ecause initial subject matter jurisdiction over Lebron's federal claim is now clear, and a full trial has been conducted on an expedited basis . . . the interests of judicial

economy and fairness to the parties counsel that this litigation be completed in federal court." App. 3b (quotation omitted). Rather than complete this litigation in the district court, Lebron instead petitioned this Court for a writ of certiorari.

REASONS FOR DENYING THE PETITION

I. THIS COURT SHOULD DECLINE TO EXERCISE ITS CERTIORARI JURISDICTION TO REVIEW A NON-FINAL JUDGMENT IN AN ONGOING CASE

This Court's established practice is to "await final judgment in the lower courts before exercising . . . certiorari jurisdiction." *Virginia Military Institute v. United States*, 113 S. Ct. 2431, 2432 (1993); *see, e.g., Brotherhood of Locomotive Firemen & Enginemen v. Bangor & Aroostook R. Co.*, 389 U.S. 327, 328 (1967) (per curiam) (denying certiorari because the court of appeals' remand of the case rendered the decision "not yet ripe for review by this Court"); *American Construction Co. v. Jacksonville, T. & K.W. Ry. Co.*, 148 U.S. 372, 384 (1893). The lack of finality in the judgment below "of itself alone" furnishes "sufficient ground for the denial of the application." *Hamilton-Brown Shoe Co. v. Wolf Bros. & Co.*, 240 U.S. 251, 258 (1916).

No final judgment exists here. Still pending before the district court is petitioner's contract claim, which may provide him precisely the relief he seeks from this Court. Petitioner claims that, regardless of whether Amtrak may adopt a policy prohibiting political advertising on the Spectacular, he possesses a contractual right to display his advertorial in that forum. C.A.App. 93-94 (Complaint), 1326-45 (Plaintiff Michael Lebron's Pre-Trial Proposed Con-

clusions of Law). Amtrak disagrees, but no court has yet passed on that claim.

The procedural posture of this case provides a particularly compelling reason why this Court should decline to exercise its certiorari jurisdiction. Resolution of petitioner's contract claim might obviate any need for this Court to address a constitutional question. "If there is one doctrine more deeply rooted than any other in the process of constitutional adjudication, it is that [this Court] ought not to pass on questions of constitutionality . . . unless such adjudication is unavoidable." *Spector Motor Service, Inc. v. McLaughlin*, 323 U.S. 101, 105 (1944). *See generally Ashwander v. TVA*, 297 U.S. 288, 347 (1936) (Brandeis, J., concurring) ("[I]f a case can be decided on either of two grounds, one involving a constitutional question, the other a question of . . . general law, the Court will decide only the latter."); *Pennhurst State School & Hospital v. Halderman*, 465 U.S. 89, 117 (1984) (when a case may be decided "solely on the basis of a pendent state-law claim . . . the court usually should do so in order to avoid federal constitutional questions").

Accordingly, this Court should deny the petition and permit the district court to resolve petitioner's contract claim—a claim that the district court should have addressed in the first instance before reaching any constitutional questions.

II. THE COURT OF APPEALS CORRECTLY APPLIED THIS COURT'S PUBLIC FORUM DECISIONS

The merits of this case do not warrant review by this Court in any event. Petitioner contends that this case "presents the opportunity to provide much needed guidance in a notoriously confused area of

First Amendment doctrine," and that the decision of the court of appeals, "if left unreviewed, would mark the death knell of public forum doctrine." Pet. 13, 14. Neither assertion is correct. The court of appeals applied legal principles well established by more than a half dozen decisions of this Court—one of which, *Lehman v. City of Shaker Heights, supra*, is directly on point.

A. This Court's Public Forum Doctrine Is Clear and Well-Defined

It is "well settled" that even "the government need not permit all forms of speech on property that it owns and controls." *International Society For Krishna Consciousness, Inc.* (*"ISKCON"*) *v. Lee*, 505 U.S. 672, 678 (1992). "With respect to public property that is not a designated public forum open for indiscriminate public use for communicative purposes," this Court has held that "'[c]ontrol over access . . . can be based on subject matter and speaker identity so long as the distinctions drawn are reasonable in light of the purpose served by the forum and are viewpoint neutral.'" *Lamb's Chapel v. Center Moriches Union Free School District*, 113 S. Ct. 2141, 2147 (1993) (quoting *Cornelius v. NAACP Legal Defense & Education Fund, Inc.*, 473 U.S. 788, 806 (1985)).

"Not every instrumentality used for communication . . . is a . . . public forum by designation." *Cornelius*, 473 U.S. at 803. And the mere fact "[t]hat [expressive] activity occurs in the context of the forum created does not imply that the forum thereby becomes a public forum for First Amendment purposes." *Id.* at 805. "The government does not create a public forum by inaction or by permitting

limited discourse, but only by intentionally opening a nontraditional forum for public discourse." *Id.* at 802; *see ISKCON*, 505 U.S. at 680; *Perry Education Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 47 (1983).

The government may open a forum generally for expressive activity, or it may open a forum only "for a limited purpose such as use by certain groups . . . or for the discussion of certain subjects." *Perry*, 460 U.S. at 46 n.7 (citations omitted). When the government creates a limited public forum, the "right of access . . . extend[s] only to other entities of similar character." *Id.* at 48. Those seeking to engage in speech not previously permitted in the forum may be excluded, so long as such distinctions are "reasonable" and "not an effort to suppress the speaker's activity due to disagreement with the speaker's view." *ISKCON*, 505 U.S. at 679; *see Lamb's Chapel*, 113 S. Ct. at 2147; *Cornelius*, 473 U.S. at 806; *Perry*, 460 U.S. at 46.

B. The Court of Appeals Correctly Defined the Forum as the Spectacular

Application of this well-established framework makes this case an easy one. Because Amtrak has not heretofore opened the Spectacular for political advertising, it need not open the Spectacular to petitioner for that purpose.

It is undisputed that Amtrak has never designated the Spectacular as a forum for political speech, and that political speech has never appeared on the Spectacular. Faced with these apparently dispositive facts, petitioner argues that the relevant forum is something other than the Spectacular. Pet. 16-17. He

claims that the relevant forum is all of Penn Station, and that Amtrak has opened other parts of Penn Station to political advertising.

Petitioner is wrong that Amtrak has intentionally designated any portion of Penn Station as a forum for political advertising.[6] But that narrow factual dispute is irelevant in any event. The panel's holding that the Spectacular—and not Penn Station—is the relevant forum for purposes of analysis was clearly correct, and there has never been an ad on the Spectacular that is remotely political or anything other than purely commercial.

In a long line of unvarying authority, this Court has made plain that the forum is defined by "the

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[6] He repeatedly alleges that Amtrak "consistently" has displayed "political advertising" at Penn Station. *E.g.*, Pet. 3, 7. But no court has made such a finding, and there is no evidence anywhere in the record that a political advertisement of any kind, much less a political attack ad like the petitioner's, has ever been displayed anywhere in Penn Station. The district court pointed to a handful of ads that it asserted "are not 'commercial,' and some of which are arguably 'political.'" App. 20c. But the record discloses nothing whatsoever about the content of three of the cited ads—ads placed by the New York Departments of Commerce and the Environment and the Foundation for Muscular Dystrophy. The fourth ad—a paid ad for Plain Truth magazine—promotes a product, the magazine. The placement of that ad in Penn Station is consistent with the acceptance of advertisements for publications without regard to the publication's content. E 261, E 347. Both the panel majority, as well as the dissent, found that these "assertedly borderline cases" were of a different kind than petitioner's advertorial. App. 18a. As Chief Judge Newman explained in dissent, "Amtrak's billboard space in Pennsylvania Station, even if used in the past for ads of a public service nature, has not become a forum for ads of such pointed political content as Lebron's . . . ." 12 F.3d at 394.

access sought by the speaker." *Cornelius*, 473 U.S. at 801. "When speakers seek general access to public property, the forum encompasses that property. In cases in which limited access is sought, [this Court's] cases have taken a more tailored approach to ascertaining the perimeters of a forum within the confines of the government property." *Id.* (citation omitted).

For example, in *Lehman v. City of Shaker Heights*, where plaintiffs sought to compel the city to permit political advertising on city-owned buses, "[t]he Court treated the advertising spaces on the buses as the forum." *Cornelius*, 473 U.S. at 801; *see Lehman*, 418 U.S. at 303. Similarly, in *Perry Education Association v. Perry Local Educators' Association*, where the plaintiffs sought access to a school's internal mail system and teachers' mailboxes, the Court defined the forum as those internal mail facilities and not the school generally. 460 U.S. at 46. In *Cornelius v. NAACP Legal Defense & Education Fund*, where legal defense and political advisory organizations sought to be included in the Combined Federal Campaign ("CFC"), an annual charitable fundraising drive conducted in the federal workplace, the Court defined the forum as the CFC, not the federal workplace. 473 U.S. at 800-01. And in *United States v. Kokinda*, 497 U.S. 720 (1990), where the plaintiffs sought to "solicit alms and contributions" on a postal sidewalk, the plurality focused on whether the sidewalk, and not the entire post office, was a public or nonpublic forum. *Id.* at 727-37.

These cases—none of which is even mentioned by the petitioner—make clear that the forum here is the Spectacular. Petitioner does not seek general access to Amtrak property, to Penn Station, or even to the

advertising spaces located within Penn Station. Petitioner seeks access *only* to the Spectacular because, in his words, that forum provides "an extraordinarily unique advertising location." App. 6a. Petitioner maintains, and Amtrak agrees, that due to its size, location, and prominence, there is no other advertising vehicle in Penn Station that commands the same attention or offers a comparable vehicle to reach Amtrak passengers. App. 5a-6a. Because the Spectacular is a unique forum, and because petitioner seeks access to it alone, the court of appeals properly framed the issue in this case to be whether Amtrak has intentionally designated *the Spectacular* as a forum for political advertising.

Petitioner contends that the forum should be determined by the reach of Amtrak's policy, rather than by the access he seeks. That argument ignores not only established public forum doctrine, but also the facts of this case. Although Amtrak prohibits political advertising anywhere on its property, the application of that policy to the Spectacular differs in one critical respect: due to the Spectacular's size, location and prominence—and because there is no equivalent forum in Penn Station—Amtrak subjects only those advertisements slated to appear on the Spectacular to prior review and approval. C.A.App. 366. Amtrak's policy of prior approval on the Spectacular ensures that political ads will not appear in that forum through inadvertence, and establishes beyond doubt its intent to "exercise control over the subject matter of the displays." *Cornelius*, 473 U.S. at 804 (discussing *Lehman*).[7]

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[7] The law could hardly be as petitioner maintains. If the forum were Penn Station, not the Spectacular, Amtrak could

Petitioner contends that the court of appeals' analysis "conflicts with the decisions of the Seventh and Tenth Circuits." Pet. 17 (citing *Air Line Pilots Ass'n v. Department of Aviation*, 45 F.3d 1144 (7th Cir. 1995) and *Eagon v. City of Elk City*, 72 F.3d 1480 (10th Cir. 1996)). This is a remarkable assertion. Before the Second Circuit, petitioner affirmatively recognized that the Seventh Circuit's decision in *Air Line Pilots* "supports Amtrak's argument that the Spectacular is the relevant forum [because] the court found that the forum is defined in terms of the access sought by the speaker." Supplemental Letter Brief (5/5/95) (quotation omitted). That concession was correct. Applying *Cornelius*, the Seventh Circuit held that the district court erred in defining the relevant forum as O'Hare Airport, rather than the advertising display cases to which the plaintiff sought access. 45 F.3d at 1151-52.

As for the Tenth Circuit's decision in *Eagon*, petitioner misstates the court's holding. The Tenth Circuit did not hold that "the relevant forum for First Amendment analysis was . . . the public park." Pet. 17-18. Rather, the court of appeals held that the park "during the 'Christmas in the Park' event was a public forum." 72 F.3d at 1487. Neither the Tenth Circuit's holding, nor what petitioner claims the hold-

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satisfy petitioner's demand for access by offering him advertising space elsewhere at Penn Station. Indeed, if petitioner were correct that the forum must be regarded as coextensive with Amtrak's policy against political advertising, then the forum must be regarded as *all* Amtrak property, because the policy applies on all Amtrak property. C.A.App. 349-52. In that case, Amtrak could satisfy the petitioner's demand for access by offering him space on any billboard it owns along its right-of-way. Plainly that is not what petitioner seeks.

ing to be, conflicts with the analysis of the court of appeals in this case.

In sum, the court of appeals faithfully applied well-settled legal principles and correctly determined that the Spectacular is the relevant forum.

C. This Court Has Held That a Policy of Prohibiting Political Advertising on Government Property Is Both Reasonable and Viewpoint-Neutral

The undisputed fact that no political advertising has ever appeared on the Spectacular forecloses any argument that the Spectacular has been designated a forum for political speech. The only remaining question, then, is whether Amtrak's choice is reasonable and viewpoint-neutral. This Court's decision in *Lehman v. City of Shaker Heights*, *supra*, makes plain that it is.

In *Lehman*, the City of Shaker Heights prohibited all political advertisements on city-owned buses, while permitting commercial and service-oriented advertising. This Court upheld the city's policy, emphasizing the commercial nature of the city's enterprise:

> [T]he city is engaged in commerce. . . . The car card space, although incidental to the provision of public transportation, is a part of the commercial venture. In much the same way that a newspaper or periodical, or even a radio or television station, need not accept every proffer of advertising from the general public, a city transit system has discretion to develop and make reasonable choices concerning the type of advertising that may be displayed in its vehicles.

418 U.S. at 303 (plurality opinion). The plurality reasoned that in such circumstances, a governmental

limitation on access to property it controls is valid so long as the policy is not "arbitrary, capricious, or invidious." *Id.* Under that standard, the city's prohibition against political advertisements was permissible. Absent the policy, the plurality reasoned,

> [u]sers [of the buses] would be subjected to the blare of political propaganda. There could be lurking doubts about favoritism, and sticky administrative problems might arise in parceling out limited space to eager politicians. In these circumstances, the managerial decision to limit car card space to innocuous and less controversial commercial and service oriented advertising does not rise to the dignity of a First Amendment violation. Were we to hold to the contrary, display cases in public hospitals, libraries, office buildings, military compounds, and other public facilities immediately would become Hyde Parks open to every would-be pamphleteer and politician. This the Constitution does not require.

Id. at 304. Precisely the same reasoning is applicable here. As the court of appeals explained, citing *Lehman*, "Amtrak's decision, as proprietor, to decline to enter the political arena, even indirectly, by displaying political advertisements is certainly reasonable." App. 14a.[8]

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[8] Petitioner contends that "*Lehman* rests on a captive audience rationale not applicable here." Pet. 23 n.21. This Court has declined to so limit its decision in *Lehman*. *See ISKCON*, 505 U.S. at 678; *Kokinda*, 497 U.S. at 725-26; *Cornelius*, 473 U.S. at 801, 803-04, 806, 808-09; *Perry*, 460 U.S. at 49 n.9. In any event, the Amtrak riders who are forced to confront the 103 foot-long Spectacular as they descend the escalator at the entrance to Penn Station are no less "captive" than the audience that viewed the ads inside and outside the transit cars in *Lehman*.

Petitioner does not argue that Amtrak's decision to limit the Spectacular to commercial advertising is unreasonable, but rather that such a policy amounts to viewpoint discrimination. He contends that this case is not controlled by *Lehman*, but by *Lamb's Chapel v. Center Moriches Union Free School District*, 113 S. Ct. 2141 (1993), and *Rosenberger v. Rector of the University of Virginia*, 115 S. Ct. 2510 (1995). Petitioner mischaracterizes the holdings in those cases, however, and misapplies them to the facts here.

In *Lamb's Chapel*, the Court held that a public school district engaged in impermissible viewpoint discrimination by opening a forum "to be used for the presentation of all views about family issues and child-rearing except those dealing with the subject matter from a religious standpoint." 113 S. Ct. at 2147. The school district had designated its property to be used for a wide variety of social, civic, and recreational purposes, but then denied access to a religious group that wished to use the forum for a lecture and film about family values. There was no dispute that "[t]he film involved . . . dealt with a subject otherwise permissible" under the district's policy, and that access was denied "solely because the film dealt with the subject from a religious standpoint." *Id.* at 2147. The Court concluded that the district had engaged in impermissible viewpoint discrimination by " 'deny[ing] access to a speaker solely to suppress the point of view he espouses on an otherwise includable subject.' " *Id.* (quoting *Cornelius*, 473 U.S. at 806).

Similarly, in *Rosenberger*, the Court held that the University of Virginia engaged in impermissible viewpoint discrimination by denying funding to a

student newspaper solely because of the paper's religious editorial views. The newspaper reported on a wide variety of subjects addressed by other student organizations, such as racism, crisis pregnancy, stress and eating disorders, but did so from a religious perspective. 115 S. Ct. at 2515. The Court held that the University's regulation, like the school district's policy in *Lamb's Chapel*, impermissibly distinguished between speakers based upon their views, rather than the subject matter of their speech:

> [T]he University does not exclude religion as a subject matter but selects for disfavored treatment those student journalistic efforts with religious editorial viewpoints. Religion may be a vast area of inquiry, but it also provides, as it did here, a specific premise, a perspective, a standpoint from which a variety of subjects may be discussed and considered. The prohibited perspective, not the general subject matter, resulted in the refusal to make third-party payments, for the subjects discussed were otherwise within the approved category of publications.

115 S. Ct. at 2517-18.

This Court's holdings in *Lamb's Chapel* and *Rosenberger* offer no support to petitioner. The Coors family's support of a particular political agenda, the Nicaraguan Civil War, and the "influence of a powerful, urban, materialistic and individualistic culture on rural, community based, family-oriented and religious cultures," are not "subjects otherwise permissible" for display on the Spectacular. Had Amtrak permitted the expression of different views on these broad themes, then the exclusion of petitioner might amount to viewpoint discrimination. But Amtrak has

never opened the Spectacular for speakers to address such subjects—regardless of whether they espouse liberal or conservative, religious or secular, or any other views. Petitioner therefore cannot claim that Amtrak's enforcement of its policy as to him constitutes impermissible viewpoint discrimination.[9]

In sum, the court of appeals adhered to this Court's public forum case law in defining the applicable forum, in determining that Amtrak had not intentionally designated that forum for political speech, and in adjudicating Amtrak's policy to be reasonable and viewpoint-neutral. The court applied well-established legal principles and reached the correct result.

III. THE COURT OF APPEALS' DECISION ACCORDS WITH THIS COURT'S VAGUENESS AND STANDING CASES

A. Vagueness

Petitioner contends that, notwithstanding this Court's decision in *Lehman*, Amtrak's policy of prohibiting political advertising on the Spectacular is "unconstitutionally vague." Pet. 22. But surely petitioner has no serious doubt that his ad falls outside

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[9] Petitioner states that the Seventh Circuit in *Air Line Pilots* held that a policy against political advertising in O'Hare Airport would constitute viewpoint discrimination if " 'the proposed [advertisement] dealt with a subject that was otherwise permissible in a given forum.' " Pet. 15 (quoting *Air Line Pilots*, 45 F.3d at 1159). The Seventh Circuit did not find that a policy of excluding political advertising constitutes viewpoint discrimination, only that it would if inconsistently applied. That simply is not the case here. Amtrak has excluded *all* political advertising from the Spectacular, and has not denied petitioner access to that forum to discuss subjects "otherwise permissible" there.

the bounds of what Amtrak's policy permits. Amtrak has only allowed commercial advertising on the Spectacular, and petitioner has recognized that his advertorial "wasn't commercial in the way they are used to." C.A.App. 228. Amtrak does not permit "political" advertising on the Spectacular, and petitioner, a self-proclaimed "political artist," himself describes his advertorial as a "political statement." C.A.App. 8. Thus, the very term that petitioner deems "vague" is one that he himself uses to distinguish his work from other types of advertising.

Petitioner argues that this Court held in *Hynes v. Mayor of Oradell*, 425 U.S. 610 (1976), that the term "political . . . cause" is unconstitutionally vague. Pet. 22-23.[10] But the Court held no such thing. The ordinance at issue in *Hynes* required persons soliciting "for a Federal, State, County or Municipal political campaign or cause" to notify the local police department, in writing, of their proposed activities. *Id.* at 613. Those who failed to follow this procedure were subject to a criminal sanction. *Id.* at 615. This Court found that while "it is fairly clear what the phrase 'political campaign' comprehends . . . it is not clear what is meant by a 'Federal, State, County or Municipal . . . Cause'" *Id.* at 621 (second set of ellipses in original). The Court found only this latter phrase vague—not the term "political."

The decision of this Court that is on point is *Lehman*, which upheld a ban on political advertising without any reservation that the term "political"

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[10] This is the first time that petitioner has invoked *Hynes* to support a vagueness challenge. He did not cite this allegedly controlling case before the district court or the court of appeals.

might be unconstitutionally vague. Petitioner argues that "*Lehman* did not even address a vagueness claim." Pet. 23. But Justice Brennan argued strongly in dissent that "[t]he line between ideological and nonideological speech is impossible to draw with accuracy"—that it is not "possible to draw a manageable line" of the kind drawn by a policy prohibiting political advertising. 418 U.S. at 319, 320. Those arguments were unpersuasive to the majority.

B. Standing

Petitioner's standing argument is equally meritless. In effect, that claim amounts to nothing more than an effort by petitioner to recast his argument that Amtrak must grant him access to the Spectacular because, in his view, Penn Station has been designated an open forum for political speech. Having determined that the relevant forum is the Spectacular, the court of appeals explained that petitioner lacked standing to challenge the application of Amtrak's policy to some other forum to which he did not seek access. App. 3b. The court of appeals' reasoning is hardly "novel" or "unfounded." Pet. 24. Whether Amtrak could have invoked its policy to exclude petitioner from some forum other than the Spectacular is not an issue that petitioner has asked any court to resolve. To the contrary, petitioner has made clear that he has no interest in any advertising space other than the Spectacular.

Petitioner notes that standing has not been an issue in any of this Court's public forum cases, Pet. 25, but that is because the plaintiffs in those cases limited their challenge to their exclusion from the forum to which they sought access. Nothing in those cases, or any other case decided by this Court, con-

flicts with the court of appeals' decision not to adjudicate petitioner's right of access to a forum in which he has disavowed any interest.

CONCLUSION

For the foregoing reasons, the petition should be denied.

Respectfully submitted,

KEVIN T. BAINE *
STEVEN M. FARINA
WILLIAMS & CONNOLLY
725 Twelfth Street, N.W.
Washington, D.C. 20005
(202) 434-5000
Counsel for Respondent National Railroad Passenger Corporation

Of Counsel:
DANIELA WINKLER
RICHARD G. SLATTERY
NATIONAL RAILROAD PASSENGER CORP.
60 Massachusetts Avenue, N.E.
Washington, D.C. 20002

April 11, 1996

* Counsel of Record

APPENDIX

APPENDIX

After a hard week's work, you're ready for the right place with the right one. Why make the right moment the right's moment? Coors Light not only has the taste that won't slow you down. It's the Silver Bullet that aims the Far Right's political agenda at the heart of America. Want the awesome facts? Then read between these lines.

Every year, the Coors family, owners of Coors Brewing Co., gives financial support to groups like The National Forum Foundation, Morality in Media, The Heritage Foundation and The Free Congress Foundation. They form part of a network that includes authoritarian religious and political extremists. When you buy Coors products, you help them turn back civil rights, censure [sic] high school textbooks, weaken labor laws and environmental protections, promote homophobia, and meddle in foreign affairs. Did you know Joe Coors himself bought an aircraft for the Nicaraguan contras?

Where are the Nicaraguan contras today? El Loco says "Once, we were glad to have Joe Coors and his friends on our side. Together, we fought the hard and dirty fight that drove Nicaraguans to the voting booth to make The Right's Choice for a Better Nicaragua! Now the shooting war is over; after 30,000 dead, I can walk into my favorite Managua bar and say, 'No more of that industrial strength Nicaraguan cervesa for me. Gimme the great taste of Coors Light!' But my family, and Nicaraguan families everywhere, are poorer than ever. With 55% unemployed, we scour garbage heaps for food in the villages we ravaged. What happened to all that promised U.S. aid? What does it really mean to say that Coors Light is The Right's Beer now?"

E 2210-18 (footnotes omitted).

No. 95-1373

(3)

Supreme Court, U.S.
APR 24 1996

IN THE

Supreme Court of the United States

OCTOBER TERM, 1995

MICHAEL A. LEBRON,

Petitioner,

—v.—

NATIONAL RAILROAD PASSENGER CORPORATION (AMTRAK),

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

REPLY MEMORANDUM FOR PETITIONER

R. BRUCE RICH
BERNADETTE M. MCCANN EZRING
JONATHAN BLOOM
MARC BROTMAN
WEIL, GOTSHAL & MANGES LLP
767 Fifth Avenue
New York, New York 10153
(212) 310-8000

GLORIA C. PHARES
PAUL, HASTINGS, JANOFSKY & WALKER
399 Park Avenue
New York, New York 10022
(212) 318-6016

DAVID D. COLE
Counsel of Record
CENTER FOR CONSTITUTIONAL RIGHTS
Georgetown University Law Center
600 New Jersey Avenue, N.W.
Washington, D.C. 20001
(202) 662-9078

Attorneys for Petitioner

15PP

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INTRODUCTION

Amtrak concedes in its opposition that its asserted policy against political advertising applies to all Penn Station advertising. Pet. Opp. 9. It now describes this restriction as permitting only "commercial advertising." *Id.* at 2.[1] Yet the district court found that Amtrak had permitted the display of numerous noncommercial ads in Penn Station. Pet. App. 20c.

[1] In fact, no Amtrak official ever described the policy in this way. Pet. 6-7 (delineating Amtrak officials' conflicting descriptions of policy); *see also* Pet. App. 17c (finding that Amtrak's executives "were themselves at odds over the meaning of Amtrak's policy").

These included a long-running ad for *The Plain Truth*, a free conservative religious magazine dealing with social and political issues that sold nothing and was both advertised and distributed from a four-sided kiosk immediately in front of the Spectacular, the billboard to which Michael Lebron sought access. Because Amtrak had one stationwide policy, the *Plain Truth* ad could have been displayed on the Spectacular. At the time Amtrak rejected Lebron's ad, the *Plain Truth* ad read "Say No to Adultery." Yet Amtrak maintains that it could constitutionally invoke an unwritten policy to reject Lebron's ad—which essentially said "Say No to Coors"—on the ground that his ad was noncommercial, and therefore "political."

The only way to uphold such viewpoint-based discrimination is to disregard Amtrak's prior treatment of advertising under the policy, which is precisely what the panel majority did. As Chief Judge Jon O. Newman pointed out in dissent, "[t]he majority has concluded that the policy has been consistently applied by overlooking the instances where it has not been consistently applied." Pet. App. 5b.

In its opposition, Amtrak seeks to defend the court of appeals' blindered analysis by advancing a "display-case-by-display-case" theory of public forum doctrine. Under this theory, the government may justify discriminatory treatment of speech under a single policy by limiting judicial inquiry to the specific display case to which a speaker sought access, even where under the government's own asserted policy the same content standards apply to all display cases.

If the government can avoid a charge of viewpoint or content discrimination by simply disregarding its prior inconsistent treatment of other speech, it will always be able to argue that its actions were neutral. The court of appeals' analysis robs both the public forum doctrine and the content and viewpoint neutrality mandates of any vitality, and therefore warrants review.

ARGUMENT

I. THE INTERLOCUTORY NATURE OF THE COURT OF APPEALS' DECISION DOES NOT PRECLUDE SUPREME COURT REVIEW

As a threshold matter, Amtrak argues that the Court should not grant certiorari because the court of appeals remanded the case to the district court for resolution of Lebron's contract claim, making its decision technically interlocutory. But there is no jurisdictional bar to review of interlocutory federal court of appeals decisions under 28 U.S.C. § 1254(1), and this Court often grants such review where First Amendment rights are at issue.[2] Where, as here, delaying review will cause harm to time-sensitive First Amendment rights and upholding the constitutional claims will terminate the litigation, immediate review is especially warranted.

"The loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury." *Elrod v. Burns*, 427 U.S. 347, 373 (1976). Precisely because Lebron's ad was time-sensitive, the district court expedited proceedings and issued a permanent injunction within five weeks after filing. Yet the court of appeals' stay of that injunction has now been in place for more than three years, as this case has proceeded to the court of appeals twice, and is now before this Court for a second time. Remitting Lebron to district court to litigate his contract claim at this

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[2] *See, e.g., Doran v. Salem Inn, Inc.*, 422 U.S. 922, 927 (1975) (granting certiorari from decision affirming preliminary injunction in First Amendment challenge to ordinance against topless dancing); *Herbert v. Lando*, 441 U.S. 153, 158 & n.3 (1979) (granting certiorari to review order protecting libel defendant from discovery and remanding for further proceedings); *Time, Inc. v. Pape*, 401 U.S. 279, 283 (1971) (granting certiorari from interlocutory order remanding libel case to district court for jury determination); *see generally* 17 Charles A. Wright et al., *Federal Practice and Procedure* § 4036 at 30-31 (2d ed. 1988) (and cases cited therein); Robert L. Stern & Eugene Gressman, *Supreme Court Practice* § 4.18 at 195 (7th ed. 1993).

late date would at a minimum delay relief for several more years. Even where speech rights are not at stake, the Court has granted certiorari from a non-final judgment where "delay of perhaps a number of years . . . might work a great injustice." *Gillespie v. U.S. Steel Corp.*, 379 U.S. 148, 153 (1964).

The Court's concern for the impact of delay on First Amendment freedoms has led it to review even interlocutory state court judgments, where, unlike here, finality is a jurisdictional prerequisite. In *Miami Herald Publishing Co. v. Tornillo*, 418 U.S. 241 (1974), for example, the Court granted certiorari to review the constitutionality of a right-of-reply statute, even though the Florida Supreme Court had remanded the case for trial. Had the newspaper prevailed on statutory grounds at trial, the constitutional issue might have been avoided. Nonetheless, the Court granted certiorari, stating, "it would be intolerable to leave unanswered, under these circumstances, an important question of freedom of the press under the First Amendment; an uneasy and unsettled constitutional posture of [the statute] could only further harm the operation of a free press." *Id.* at 247 n.6.[3] The case for immediate review is even stronger here, where there is no "finality" jurisdictional requirement, and delaying resolution will result not merely in an indirect chilling effect, but in the direct and continuing deprivation of speech rights.[4]

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[3] *See also Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469, 485-86 (1975) (granting certiorari to review First Amendment challenge to a rape victim shield law, where the state supreme court had remanded for further proceedings, because "a failure to decide the question now will leave the press in Georgia operating in the shadow of the civil and criminal sanctions of a rule of law and a statute the constitutionality of which is in serious doubt"); *Fort Wayne Books, Inc. v. Indiana*, 489 U.S. 46, 56 (1989) (granting certiorari where party seeking review might prevail on nonconstitutional grounds in further state court proceedings because resolution of First Amendment issue "should not remain in doubt").

[4] *See Organization for a Better Austin v. Keefe*, 402 U.S. 415, 418 n. (1971) (granting certiorari to review state court's temporary injunction where "the temporary injunction . . . which has already been in effect

Amtrak also invokes the prudential rule that constitutional questions should be avoided where the dispute may be resolved on nonconstitutional grounds. But that rule does not apply here. First, nonconstitutional grounds not considered below do not trigger this prudential rule:

> The fact that there may be buried in the record a nonconstitutional ground for decision is not by itself enough to invoke th[e] rule [of avoiding constitutional questions]. 'Where issues are neither raised before nor considered by the Court of Appeals, this Court will not ordinarily consider them.'

Zobrest v. Catalina Foothills School Dist., 509 U.S. 1, ___, 113 S.Ct. 2462, 2466 (1993) (*quoting Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 147 n.2 (1970)).[5] This case has been litigated solely on First Amendment grounds since the district court's initial decision in February 1993, and Amtrak has never previously argued that the contract claim should have been resolved first. Indeed, plaintiff did not pursue his state law claim on appeal, and did not ask that the state law claim be resurrected.[6]

Second, the state law claim to which Amtrak now points would not provide Lebron with complete relief, and therefore

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for over three years, has already had marked impact on petitioner's First Amendment rights").

[5] *See also Airport Comm'rs of Los Angeles v. Jews for Jesus, Inc.*, 482 U.S. 569, 572 (1987) (granting certiorari to decide First Amendment issue where district court and court of appeals decided case on First Amendment grounds without reaching plaintiffs' state law claims).

[6] The court of appeals resurrected the state law claim *sua sponte*, not when it issued its initial decision on the First Amendment claims in October 1995 (Pet. App. 18a), but only when it denied rehearing. Pet. App. 30. Lebron should not be forced to forfeit expeditious resolution of his First Amendment claim merely because a panel that may have considered its opinion vulnerable to this Court's review sought to render its opinion interlocutory, by reviving a claim no party had mentioned, much less pursued.

would not permit avoidance of the First Amendment issue.[7] Contract law offers no basis for expedited relief to forestall Lebron's irreparable injury to his First Amendment rights, and therefore cannot provide *immediate* relief for that injury. Moreover, the scope of Amtrak's "disapproval" rights under the contract may turn on whether it had *constitutional* authority to reject the ad as political. Thus, the contract claim will not render First Amendment analysis unnecessary.

Third, the Court has reviewed interlocutory judgments in speech cases even where unresolved nonconstitutional claims could theoretically provide full relief. *See Tornillo*, 418 U.S. at 247; *Cox Broadcasting*, 420 U.S. at 485; *Organization for a Better Austin*, 402 U.S. at 418 n.. Those cases establish that the mere possibility of nonconstitutional resolution is no bar to review where, as here, the lower courts have finally resolved the First Amendment claim, further delay will cause continuing First Amendment harm, and upholding the First Amendment claim will terminate the litigation.

II. EVEN IF THE FORUM IS LIMITED TO THE SPECTACULAR, PUBLIC FORUM ANALYSIS REQUIRES EXAMINATION OF HOW AMTRAK IMPLEMENTED ITS STATIONWIDE POLICY ON OTHER BILLBOARDS

Amtrak's "display-case-by-display-case" theory of the public forum is predicated on the argument that the relevant "forum" is the Spectacular because that is the specific billboard to which Lebron sought access. But even assuming that the forum should be so limited, it does not follow that evidence of Amtrak's acceptance of noncommercial ads on other Penn Station billboards is irrelevant. Since by Amtrak's own account it applies *the same policy* to all advertising spaces in

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[7] Indeed, Amtrak has argued that there is no contract between Lebron and Amtrak, and that the TDI-Amtrak contract language providing that "all advertising material . . . shall be subject to approval by Amtrak," E5, precludes any contract relief.

Penn Station, evidence regarding the policy's implementation throughout the station sheds light on the actual scope of the policy as to the Spectacular. Indeed, where the policy is unwritten, and no two Amtrak officials can agree on its scope, Amtrak's practices may be the best evidence of the policy.

The court of appeals' contrary view is in direct conflict with *Air Line Pilots Ass'n v. Department of Aviation*, 45 F.3d 1144, 1154 (7th Cir. 1995). In that case, the Seventh Circuit held that public forum analysis must not accept the government's "stated or paper policy," but must "examine the *actual* policy—as gleaned from the *consistent* practice with respect to various speakers—to determine whether a state intended to create a designated public forum" (emphasis added). Such an inquiry is necessary to "guard against the dangers of post-hoc policy formulation or the discretionary enforcement of an effectively inoperative policy." *Id.* at 1153; *see also United States* v. *Kokinda*, 497 U.S. 720, 737-38 (Kennedy, J., concurring) ("If our public forum jurisprudence is to retain vitality, we must recognize that . . . customary use by the public may control the case.").

The district court found that under its single stationwide policy, Amtrak had permitted the display of numerous non-commercial ads,[8] including the *Plain Truth* ad.[9] In fact,

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[8] Amtrak now objects that the record does not support this finding, Pet. Opp. 14, but Amtrak did not challenge the district court's finding as clearly erroneous on appeal. It is too late in the day to challenge it now.

[9] Amtrak's assertion that its display of the *Plain Truth* ad was consistent with "the acceptance of advertisements for publications without reference to the publication's content," Pet. Opp. 14 n.6, is contradicted by its own officials' testimony and has never been asserted before. Both Amtrak's Vice-President in charge of advertising and Bruce Bourque, who reviews advertising content for Amtrak, testified that an ad discussing *Time* magazine's coverage of Mikhail Gorbachev's fall would be barred for its "political" content. DeAngelo Dep. at 308, 314; A835-35; E306. Amtrak cites only E261 and E347 as support for its newly claimed policy on publications, neither of which even addresses

Amtrak had *never* previously rejected an ad as political. This evidence establishes that Amtrak's invocation of its unwritten policy against Lebron was either "post-hoc policy formulation or the discretionary enforcement of an effectively inoperative policy." *Air Line Pilots Ass'n*, 45 F.3d at 1153. Yet the panel considered none of that evidence relevant.

In this respect, the panel's result directly conflicts with *Air Line Pilots Ass'n*. In that case, although the union sought access to a single display case in O'Hare Airport's Concourse B, 44 F.3d at 1148, the Seventh Circuit did not limit its inquiry to one specific display case. Indeed, the court specifically reversed the district court because it had examined only the 48 display cases in Concourse B, rather than all O'Hare advertising spaces. *Id.* at 1154. Here, the panel majority limited its inquiry to a single display case, and in doing so undermined any speech-protective function of the public forum doctrine.

III. THE COURT OF APPEALS' DETERMINATION THAT AMTRAK'S POLICY WAS VIEWPOINT-NEUTRAL CONFLICTS WITH DECISIONS OF THIS COURT AND OTHER COURTS OF APPEALS

Lebron argued that Amtrak's conduct in this case was viewpoint discriminatory in two senses: (1) it permitted the display of the politically conservative, noncommercial *Plain Truth* ad

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the issue. E261 lists advertisers who displayed ads in Penn Station, and E347 is petitioner's objection to the quality of certain photocopies. And even this post-hoc justification fails to explain how an ad for a purely noncommercial magazine falls within a policy purportedly limited to commercial ads.

If Amtrak's policy were to accept any ad for a publication, no matter how political the ad, and regardless of the noncommercial nature of the publication, its policy would be unreasonable in light of the purposes of the forum because it would not serve Amtrak's asserted purpose of avoiding political controversy. Amtrak's claim that Lebron has not challenged Amtrak's policy as "unreasonable" in light of the purposes of the forum, Pet. Opp. 20, is simply wrong. *See* Pet. 21 n.20.

while barring the display of Lebron's politically liberal noncommercial ad; and (2) its policy against "political" advertisements is itself viewpoint-based under this Court's decisions holding policies against "religious" speech viewpoint-based. Pet. 14-16.

Amtrak offers no response whatsoever to the first argument, except to proffer for the first time a purported policy regarding advertising for publications that is contrary to its own officials' testimony and that renders the policy wholly arbitrary. The undisputed fact is that Amtrak displayed politically conservative noncommercial ads for *The Plain Truth* for five years, and then turned around and told Lebron it would not display his ad because it was political. A more blatant form of viewpoint discrimination would be difficult to imagine.

Amtrak maintains that its general policy is viewpoint-neutral because it prohibits political "subject matter," not political viewpoints. But whatever else one might say about Lebron's ad, it plainly addresses the otherwise includable subject of whether to buy Coors beer. *See* Pet. Opp. 1a. Amtrak does not deny that under its policy Coors could display ads urging viewers to buy Coors beer, and Anheuser-Busch could display ads urging viewers not to buy Coors beer because Budweiser tastes better. Thus, the same subject matter—whether to buy Coors beer—is permitted if addressed from a "commercial" viewpoint, but barred if addressed from a "political" viewpoint. Under *Rosenberger v. Rector of the University of Virginia*, 115 S. Ct. 2510 (1995), *Lamb's Chapel v. Center Moriches Union Free School District*, 508 U.S. 384 (1993), and *Air Line Pilots Ass'n*, 45 F.3d at 1159, that is viewpoint discrimination.

IV. AMTRAK'S POLICY CANNOT BE SQUARED WITH *HYNES V. MAYOR OF ORADELL*

Amtrak contends that the panel majority's rejection of Lebron's vagueness challenge is consistent with this Court's

decision in *Hynes v. Mayor of Oradell*, 425 U.S. 610 (1976), because the Court in *Oradell* objected to the failure to define "cause," not "political." This reading is disingenuous.

The ordinance *Hynes* invalidated required permits for solicitations "for a Federal, State, County or Municipal political campaign or cause." 425 U.S. at 614 n.1. Describing the vagueness challenge, the Court stated that "persons canvassing for political causes would be uncertain whether the ordinance covered them." *Id.* at 621 n.5. And in declaring the ordinance vague, the Court expressly stated, "nor is political 'cause' defined." *Id.* at 622. The constitutional infirmity was that "cause" was modified *only* by "political," and therefore the prohibited causes were insufficiently clear. Similarly here, "advertisement" is modified only by "political," leaving would-be advertisers to guess as to what is permitted and what is not.[10]

CONCLUSION

For all the above reasons, the petition for a writ of certiorari should be granted.

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[10] Finally, Amtrak suggests that the plurality decision in *Lehman v. City of Shaker Heights*, 418 U.S. 298 (1974), implicitly holds that a policy against political advertising is not vague, notwithstanding the plurality's failure to address the issue, because the dissent complained of the inability to distinguish ideological and nonideological speech. Pet. Opp. 23-24. But petitioners in Lehman advanced no vagueness challenge, and therefore that issue was not before the Court. In addition, the plurality expressly relied on the fact that the Ohio Supreme Court had narrowly construed the ordinance so that it distinguished sharply between advertisers seeking to sell a good or service, and all others. 418 U.S. at 303-04. As the district court found, Pet. App. 16c-19c, and as Amtrak's opposition confirms, Amtrak's unwritten policy has no sharp lines, and that is precisely the problem.

Respectfully submitted,

GLORIA C. PHARES
PAUL, HASTINGS,
JANOFSKY & WALKER
399 Park Avenue
New York, New York 10022
(212) 318-6000

DAVID D. COLE
Counsel of Record
CENTER FOR
CONSTITUTIONAL RIGHTS
Georgetown University
Law Center
600 New Jersey Avenue, N.W.
Washington, D.C. 20001
(202) 662-9078

R. BRUCE RICH
BERNADETTE M. MCCANN
EZRING
JONATHAN BLOOM
MARC BROTMAN
WEIL, GOTSHAL
& MANGES LLP
767 Fifth Avenue
New York, New York 10153
(212) 310-8000

Attorneys for Petitioner

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